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Supreme Court, U.S.
FILED
APR 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM WITHWORTH,
LINCOLN J. STOKES, and
ANTHONY J. CELEBREZZE, JR.
Petitioners

vs.

RYAN HUNG-PING WANG
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE STATE CAN RETRY A CRIMINAL DEFENDANT AFTER THE FIRST TRIAL ENDS IN A MISTRIAL, AND SUCH MISTRIAL IS AT THE REQUEST OF THE DEFENDANT AND FOR THE REASONS PRESENTED BY THE DEFENDANT.

II.

WHETHER THE SUPPOSED GRANTING OF A MOTION TO ACQUIT ON THE GREATER CHARGE AT THE CLOSE OF THE STATE'S CASE PREVENTS THE TRIAL FROM CONTINUING TO A DETERMINATION ON A LESSER INCLUDED OFFENSE, OR DOES JEOPARDY BAR THE CONTINUATION OF SUCH TRIAL.

III.

WHETHER A FEDERAL APPELLATE COURT, PURSUANT TO 28 U.S.C. § 2254(d) CAN REJECT FINDINGS OF FACT MADE BY THE STATE COURTS AND THE U.S. DISTRICT COURT, WHERE SUCH FINDINGS OF FACT ARE FULLY SUPPORTED BY THE RECORD.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners William Withworth and Lincoln J. Stokes, Sheriff of Hamilton County, Ohio, respectfully pray that a Writ of Certiorari issue to Review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered on February 11, 1987

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, released on February 11, 1987, appears in the appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on February 11, 1987. The petition is timely filed and this Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1), and other appropriate jurisdictional statutes and rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 5, United States Constitution

"**AMENDMENT 5**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

28 U.S.C. § 2245.

"**28 U.S.C. § 2245. Certificate of trial judge admissible in evidence.**

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place. (June 25, 1948, ch. 646, 62 Stat. 966.)"

Ohio Revised Code § 2945.74

"**§ 2945.74 Defendant may be convicted of lesser offense.** (GC § 13448-2)

The jury may find the defendant not guilty of the offense charged, but guilty of an attempt to commit it if such attempt is an offense at law. When the indictment or information charges an offense, including different degrees, or if other offenses are included within the offense charged, the jury may find the defendant not guilty of the degree charged but guilty of an inferior degree thereof or lesser included offense.

If the offense charged is murder and the accused is convicted by confession in open court, the court shall examine the witnesses, determine the degree of the crime, and pronounce sentence accordingly."

Ohio Criminal Rule 31.

"**RULE 31. Verdict.**

(A) Return. The verdict shall be unanimous. It shall be in writing, signed by all jurors concurring therein, and returned by the jury to the judge in open court.

(B) Several defendants. If there are two or more defendants the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(C) Conviction of lesser offense. The defendant may be found not guilty of the offense charged but guilty of an attempt to commit it if such an attempt is an offense at law. When the indictment, information, or complaint charges as offense including degrees, or if lesser offenses are included within the offense charged, the defendant may be found not guilty of the degree

charged but guilty of an inferior degree thereof, or of a lesser included offense.

(D) Poll of jury. When a verdict is returned and before it is accepted the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is no unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged."

Ohio Criminal Rule 29.

"**RULE 29. Motion for Acquittal.**

(A) Motion for judgment of acquittal. The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

(B) Reservation of decision on motion. If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.

(C) Motion after verdict or discharge of jury. If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judg-

ment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury."

STATEMENT OF THE CASE

a) Proceedings in the Sixth Circuit.

Respondent Wang appealed an adverse ruling in the United States District Court to the Sixth Circuit Court of Appeals under 28 U.S.C. § 1921. On February 11, 1987, a three judge panel of that court voted 2-1 (Judge Wellford dissenting), to grant Habeas Corpus relief. Petitioners Withworth and Stokes have now instituted the present action.[1]

b) Proceedings in the District Court.

On April 20, 1984, respondent Wang filed a Petition for Writ of Habeas Corpus in the United States District Court for Southern Ohio, Western Division. On September 30, 1985, the United States Magistrate issued a report and recommendation denying relief. On December 27, 1986, the District Court entered its order and judgment adopting the recommendation of the Magistrate. (R. 35, order; R. 36, judgment)[2] Petitioner then appealed to the Sixth Circuit Court of Appeals.

c) Proceedings in State Court.

Respondent Wang was arrested on December 3, 1982, on a theft charge. He was later indicted on a felony theft charge because of a prior theft conviction. Wang was tried to a jury on March 7, 1983, before Judge Schott of the Hamilton Coun-

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[1] Petitioner Withworth is the supervisor of the Hamilton County, Ohio, Jail. Petitioner Stokes is the Sheriff of Hamilton County, Ohio. Anthony J. Celebrezze, Jr. is the Ohio Attorney General. Respondent Wang was convicted of theft in the Ohio Courts.

[2] The parties' stipulation of record of proceedings in the Ohio court contains three volumes of trial transcript from Wang's two state trials, as well as four other volumes of documents and proceedings. The second and third volumes of trial transcript will be cited as R. 14: "2T.p. ____" and "3T.p. ____" respectively. The transcript of oral argument before the magistrate will be cited as "R. 31: TR ____" and the transcript of oral argument before the district judge will be cited as "R. 49: TR ____."

ty Common Pleas Court. That trial ended in a mistrial. On March 9th, and again on March 23, 1983. Wang's motion for acquittal and motion to dismiss based on double jeopardy were overruled. No appeal was filed from these rulings. Wang's retrial began on March 23, 1983, and ended on March 24, 1983. He was found guilty of the lesser included offense of misdemeanor theft. On January 25, 1984, the Ohio First District Court of Appeals affirmed his conviction. On April 27, 1984, the Ohio Supreme Court found no substantial constitutional question and denied leave to appeal. Wang then filed his Habeas Corpus action in the United States District Court.

d) Facts.

Respondent Wang was indicted for felony theft. The charge arose out of a shoplifting incident at a Zayre Department Store, and was charged as a felony because of Wang's prior theft conviction.

The case came on for trial on March 7, 1983, before judge Schott. During its case in chief, the State presented the testimony of Zayre employee Robert Scott, and Cincinnati Police Officer Greg Brown to establish the new theft offense. The state then presented five additional witnesses to prove the prior theft conviction. At the conclusion of the state's case, Wang argued a motion for acquittal under Ohio Crim. R. 29 to the Court.[3] (R. 14: stipulation of record, document 1, trial transcript from first trial, p. 154, hereinafter 1T.p. ____). The basis of the motion was that there had been no proof that at the prior conviction the respondent had been represented by counsel. This was the first time that this issue had been presented to the Court by defense counsel. (R. 14; 1T.p. 157)

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[3] Ohio Rules of Crim. Procedure, Rule 29(A), provides that the trial court, at the conclusion of the evidence of either party, may, upon motion, acquit the defendant of the crimes charged. This rule also allows the Court to reduce the charge of a lesser offense and proceed with the trial thereof. Ohio Crim. R. 31 also provides for this.

In the alternative, Wang argued that if the Rule 29 motion was denied, that he should be given a mistrial. (R. 14; 1T.p. 155-6) The basis for the requested mistrial was that five of the state's witnesses related to the prior offense, and such a volume of that type of testimony was prejudicial to the criminal defendant, particularly where there was no proof that the prior conviction was a counseled one.

The exact language used by defense counsel in forming his request for mistrial was as follows:

> "Mr. Hoffheimer:
>
> "In addition, your Honor, should the motion for acquittal be denied, we would also move for a mistrial at this point on the essential grounds that six of the eight witnesses in this case have testified to matters relating to the prior conviction, which has at this stage of the case not resulted in any proof of that element in the crime, and when six of eight witnesses in a case testify to a prior conviction with all the inherent possible prejudices to the jury that sort of evidence has, we believe that any instruction by the Court would be too late to cure the problems that are now existing because of the jury having heard those six witnesses.
>
> "In addition, all but, I believe one of the exhibits that the prosecution has offered into evidence and to which the defendant has objected, but which the Court has taken into evidence, relate to the prior conviction, and under the circumstances we believe that the jury cannot help but question which alleged crime the defendant is on trial for, the one in 1980 or the one in 1982. For those reasons, we would also move for a mistrial at this time." (R. 14: 1T.p. 155-6)

Both the Ohio Crim. R. 29 motion and the motion for mistrial were denied at that time. The respondent then rested after presenting no evidence, and renewed his motion for acquittal and motion for mistrial. At this time the Court over-

ruled the rule 29 motion but granted the motion for mistrial. [In granting this motion, the Court used the language "new trial," but in the context of what occurred, it is clear that this was a declaration of mistrial. (R. 14: 1T.p. 163; 2T.p. 4)] The Ohio Appellate Court concluded that this was indeed a granting of a mistrial as did the U.S. Magistrate and the U.S. District Court. Although petitioners believe that the entry is easily understood as granting a mistrial and not being an evidentiary ruling, this conclusion is made beyond dispute by the certificate of the trial judge.[4] (R. 7, Certificate of Trial Judge) The entry granting mistrial reads in pertinent part as follows:

> "This case came on further to be heard upon Defendant Ryan Hung-Ping Wang's Motion for Acquittal pursuant to Ohio Criminal Rule 29(A) and alternative Motion for New Trial, both made and reasserted at the close of all of the evidence. Having considered all evidence properly before the Court and the arguments of counsel, the Court finds that the admission of evidence offered against Defendant relating to the alleged prior conviction may have prejudiced him and may have misdirected the jury to the prejudice of Defendant. The Court further finds that it affirmatively appears from the entire record that Defendant was prejudiced by the testimony of witnesses and by the evidence offered and was prevented from having a fair trial, there being nothing in the evidence before the Court to show that Defendant had an attorney or that he knowingly and voluntarily waived his right to counsel at the time of the alleged prior conviction. Therefore,
>
> "IT IS FURTHER ORDERED that Defendant's Motion for Judgment of Acquittal made at the close of all of the evidence be denied; and,

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[4] The Ohio Appellate Court and the United States District Court both held that the first trial ended in a mistrial. See the report of the U.S. Magistrate in the appendix hereto, and the certificate of the trial judge which is also in the appendix.

"IT IS FURTHER ORDERED that Defendant's Motion for New Trial made at the close of all of the evidence be granted."

On March 22, 1983, Wang argued motions to dismiss under Ohio Crim. R. 29, and a motion to dismiss based on claimed double jeopardy violations. These motions were denied by Judge Schott. No appeal was filed at that time from the denial of the double jeopardy motion. Instead, on March 23, 1983, Wang passed up his right to an immediate appeal and proceeded to trial again. The state waived opening statement at the second trial, and presented only four witnesses. These witnesses testified only as to the theft which occurred on December 3, 1982. No mention was made, nor testimony presented, as to the prior offense.

At the conclusion of the state's case, Wang moved for acquittal, arguing that the state failed to prove the crime charged in the indictment. Wang also renewed his double jeopardy motion. These motions were overruled. (R. 14; 2T.p. 168a) The Court did rule, however, that the case would proceed as a misdemeanor theft. The petitioner then rested without any evidence, and renewed his various motions. The Court overruled these motions. After deliberating briefly, the jury returned a verdict finding the petitioner guilty of misdemeanor theft. A sentence of 30 days in C.C.I., and a fine of $200.00 were eventually imposed at a later hearing.

The case was unsuccessfully appealed by Wang to the Ohio Court of Appeals and Ohio Supreme Court. Wang then filed a Habeas Corpus action in the U.S. District Court. Both the U.S. Magistrate and District Court ruled against Wang. An appeal was then filed to the Sixth Circuit Court of Appeals. A three judge panel of that Court ruled (in a 2-1 decision) that the double jeopardy clause prevented a criminal trial from proceeding on a lesser included offense where the state fails to prove the greater charge during its case in chief. To say that this ruling is a radical departure from the usual conception of the double jeopardy clause is an understatement of great

magnitude. It is in direct conflict with Federal Rule of Crim. Procedure 31(C) and the similar rules of the various states. From this ruling the petitioners have instituted the present action.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IS CONTRARY TO THE DECISIONS OF THIS COURT, AND CONTRARY TO THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE SIMILAR RULES OF PROCEDURE OF OHIO AND OTHER STATES, AND WORKS SUCH A FUNDAMENTAL AND INCREDIBLE CHANGE IN THE DOUBLE-JEOPARDY DOCTRINE THAT IT SHOULD NOT BE ALLOWED TO STAND.

The Issue.

Whether the double jeopardy clause prevents a criminal trial from proceeding on a lesser included offense where the government fails to prove the greater charge in its case in chief.

a) Introduction:

The respondent here, Wang [also referred to as defendant], was charged with felony theft, which included an allegation of a prior theft conviction. At his first trial, the state produced evidence as to the more recent theft, and then produced five witnesses to prove the older theft conviction. None of these witnesses dealt with the question of counsel at the first theft conviction, and that issue was not addressed by the state. At the conclusion of the state's case, the defendant, relying on *Baldasar* v. *Illinois*, 446 U.S. 222, 100 S.Ct. 1585 (1980), and *Scott* v. *Illinois*, 440 U.S. 367, 99 S.Ct. 1158 (1979), moved for an acquittal on the grounds that the state had not proven that he had counsel at the prior conviction.[5] The trial court denied this motion. The trial court's ruling was a correct statement of Ohio law. The Ohio Supreme Court had interpreted *Baldasar* to prevent only sentence enhancement, not to prevent the felony conviction. *State* v. *Gerwin*, 69 O.S.2d 488, 432 N.E.2d 828 (1982). In Ohio, the

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[5] Actually this would only call for a reduction to a lesser charge, not an acquittal.

Supreme Court syllabus is the holding, and the Court syllabus in *Gerwin* provides:

> "An uncounseled misdemeanor conviction for theft may be used under the enhancement provision of R.C. 2913.02(B) to convert the subsequent misdemeanor into a felony where no actual imprisonment results."

The holding of *Gerwin* is not before this Court nor was it at issue before the Sixth Circuit. The holding is only important here because it demonstrates why the trial court denied the motion for acquittal, and makes even more incomprehensible the finding of the Sixth Circuit panel majority in this case that the trial court somehow granted an acquittal at the end of the state's case.

In any event, after denying the acquittal, the trial court granted the respondent's motion for mistrial for the very reason that the respondent asked, i.e., that the volume of testimony as to the earlier conviction had prejudiced him. The respondent was eventually retried, and at the second trial, the state presented no evidence of the prior conviction and the respondent was convicted on the lesser included offense of misdemeanor theft. Wang's appeals in the state courts were unsuccessful. He filed a Habeas Corpus in the District Court for the Southern District of Ohio, Western Division, and both the Magistrate and the Court ruled against him. Wang then appealed to the Sixth Circuit where a 2-1 panel ruled in his favor.

b) Law:

The respondent's first state trial ended in a mistrial at his request, for the very reasons he advanced. The state trial judge so ruled, and his certificate filed pursuant to 28 U.S.C. § 2245 restates this. The State Appellate Court found that the first trial ended in a mistrial. The United States District Court, both the Magistrate and the Judge, found that the first trial ended in a mistrial. For some inexplicable reason, the Sixth Circuit majority decision has determined that the first

trial ended in an acquittal, *with no possibility of further proceedings*. This conclusion, if allowed to stand as is, works an incredible revolution in the practice of criminal law in this country. This is a result that should not be allowed to stand as it is in conflict with decisions of this Court.

Initially, the panel's rejection of the factual findings of the state courts is completely without basis, and is contrary to the requirements of 28 U.S.C. § 2254(d), and is in conflict with the United States Supreme Court's decision in *Sumner* v. *Mata*, 449 U.S. 539, 101 S.Ct. 764 (1981). See also *Maggio* v. *Fulford*, 462 U.S. 111, 103 S.Ct. 2261 (1983). In view of the law in Ohio regarding the use of prior uncounseled convictions to elevate a subsequent charge to a felony, the trial court simply could not [and did not] acquit the defendant on the felony charge at the first trial. The panel majority here made the same mistake that the Supreme Court warned against in *Sumner*, supra, and *Maggio*, supra. It "erroneously substituted its own judgment" for that of the State Courts.[6]

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[6] In this regard, see the Magistrate's report, adopted by the District Court, which said:

> "We find, however, that the trial judge did just what he said he did. He denied petitioner's motion for an acquittal and granted his motion for retrial. We find that the preliminary statements made by the trial judge from the bench were correctly characterized by Judge Palmer as 'ruminations of the court' before stating its final decisions. Judge Schott unequivocally concluded his comments from the bench by stating, 'I believe from the evidence that the defendant was prejudiced, thereby and prevented from having a fair trial. On that basis, I am going to grant a motion for a new trial and we will set it.'
>
> "Further, petitoner's motion for acquittal was on the ground that the State had failed to prove an essential element of the crime charged, that is, that the defendant had counsel at the time of his prior conviction. The motion for mistrial was based on the possibility that the volume of testimony concerning the prior conviction would prejudice and confuse the jury. *In both his statement from the bench and the judgment entry, the trial judge clearly differentiated between the motion for acquittal which he denied and the motion for mistrial which he granted.*" (Emphasis added) (R. 26; magistrate's report and recommendation.)

This is not the only factual error in the majority panel decision. It incorrectly states that the petitioner was reindicted after the first trial. This is not true. It also states that no evidence of the prior conviction was adduced at the first trial. This is totally incorrect. The state produced overwhelming proof of the prior offense at the first trial. Indeed the volume of this testimony is why Wang requested a mistrial.

The majority also made another crucial error in assimilating the facts of the case. At page eight of the opinion, the Court states that the issue here is to determine whether the court's ruling [singular] was an acquittal or the grant of a mistrial. This misses the whole point of what occurred. There were *two* separate rulings made in response to two separate motions by the defendant. One ruling denied an acquittal, *the other ruling* granted a mistrial. By misapprehending this situation, the majority decision totally misconstrues what occurred. Even if, as the majority here believed, the trial court granted an acquittal on the greater offense when it meant to do just the opposite, the trial still ended on Wang's request for mistrial. The majority opinion also criticizes the action of the trial judge by implying that the facts contained in the trial court's certificate, filed pursuant to 28 U.S.C. § 2245, are somehow contrary to what actually occurred. This is untrue. The trial court, as all courts, speaks through its dockets, records and entries. The trial court's remarks from the bench at the time, not couched in the language of a ruling, do not have the force of a written entry, which is prepared after a chance for reflection. Many appellate courts often express thoughts or concepts at oral argument which they expressly decline to follow in their opinions. The oral discussion is merely part of the free ebb and flow of discussion of legal issues which help the courts consider all points in reaching their holdings. They certainly are not binding and are not intended to be.

Actually, the trial court's certificate correctly applies Ohio law to the facts stated in the certificate and proved at trial. See *State* v. *Gerwin*, 69 O.S.2d 488, 432 N.E.2d 828 (1982).

The Sixth Circuit panel majority determined at page nine of the opinion that they believe *Baldasar* v. *Illinois*, 446 U.S. 222, 100 S.Ct. 1585 (1980), required proof of counsel as to the petitioner's prior conviction, and used this conclusion to critique the trial court's certificate. However, the Ohio Supreme Court, in *Gerwin*, supra, has ruled to the contrary. An Ohio trial court does not have the option of ignoring a specific ruling of the State Supreme Court.

However, for purposes of this Petition for Writ of Certiorari and for purposes of this argument only, petitioners will assume that at the conclusion of the first trial the court somehow inadvertently acquitted Wang on the greater offense of felony theft. *That assumed fact in no way changes the unchallengable fact that the proceedings terminated because of the respondent's request for mistrial.* As the dissenting panel member pointed out:

> "Even had the trial judge thought the State failed to prove its primary case, he could have allowed the case to go to the jury on the lesser included offense for which defendant Wang was later tried and convicted. *Oregon* v. *Kennedy*, 456 U.S. 667, 679 (1982); see *Wade* v. *Hunter*, 336 U.S. 684, 688-9 (1949):
>
> > 'The double jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed.'
>
> "Only the judge's perception that the defendant was unfairly prejudiced by the manner of proof about the prior conviction prevented the case going to the jury on the misdemeanor charge at the first trial. The judge responded to defendant's motion."

It is basic, fundamental criminal law that the failure of the State to prove its case as to the greater offense does not prevent the trial from proceeding on any relevant lesser included offense. This hornbook principle has been codified in Ohio and is the law of this State. Ohio Crim. R. 31(C), *Conviction of Lesser Included Offense*; R.C. 2945.74 *Defendant may be convicted of lesser offense.* Petitioners feel safe in saying that this principle is uniformly accepted throughout this nation. See, e.g. Federal Rule of Criminal Procedure 31(C), *Conviction of lesser offense.*

Even assuming the Court acquitted the respondent on the greater charge, the trial still would have continued as to the lesser included offense, *but for the mistrial granted at petitioner's request.* Contrary to the law of the land, as repeatedly stated by this Court, the Sixth Circuit panel majority had ruled that jeopardy bars a retrial where the first trial ends in a mistrial at the defendant's request. The panel majority is thus in direct conflict with any number of decisions by this Court. For example, it conflicts with all the following decisions; *Wade* v. *Hunter*, 336 U.S. 684, 69 S.C. 834 (1949); *Gori* v. *United States*, 367 U.S. 364, 81 S.Ct. 1523 (1961); *Brock* v. *North Carolina*, 345 U.S. 424, 73 S.Ct. 349 (1953); *Oregon* v. *Kennedy*, 456 U.S. 667, 102 S.Ct. 2083 (1982). Petitioner submits that before a step such as this is taken, that the Supreme Court itself should review it.

The panel decision here is also in direct conflict with *Morris* v. *Mathews*, 475 U.S. ____, 106 S.Ct. 1032 (1986), a case which arose in the Sixth Circuit. [*Mathews* v. *Marshal*, 754 F.2d 158 (1985)]. The very basic premise upon which the *Morris* decision is grounded is that a jeopardy mandated acquittal on the greater offense does not bar a conviction on the lesser included offense, even in a separate proceeding. All the parties and courts involved in that case accepted this proposition. The panel majority decision here is directly in conflict with this firmly established facet of the jeopardy doctrine.

The double-jeopardy doctrine generally protects a defendant from multiple prosecutions for the same offense. *United*

States v. *Dinitz*, 424 U.S. 600, 96 S.Ct. 1075 (1976).[7] However, the most fundamental caveat to this general statement of double-jeopardy provisions is that jeopardy does not apply to mistrials declared at the insistance of the defendant. Virtually every Supreme Court decision cited in this brief affirms this principle in some fashion. For example, in *Oregon* v. *Kennedy*, supra, the Court stated:

> "But in the case of a mistrial declared at the behest of the defendant, quite different principles come into play. Here the defendant himself has elected to terminate the proceedings against him, and the 'manifest necessity' standard has no place in the application of the Double Jeopardy Clause. *United States* v. *Dinitz*, supra, 424 U.S. at 607-610, 96 S.Ct., at 1079-81. Indeed, in *United States* v. *Tateo*, 377 U.S. 463, 467, 84 S.Ct. 1587, 1589, 12 L.Ed.2d 448 (1964), the Court stated:
>
> > 'If Tateo had requested a mistrial on the basis of the judge's comments, there would be no doubt that if he had been successful, the Government would not have been barred from retrying him.' (emphasis added)."

See also, *State* v. *Widner*, 68 O.S.2d 188, 429 N.E.2d 1065 (1981). The 2-1 decision in the present case is directly at odds with this principle.

An even more amazing aspect of the Sixth Circuit majority opinion here is how it ignores the entire concept of lesser included offenses. It goes without saying that the failure of the government to prove its case on the greater offense does not bar the conviction of the defendant on a lesser included offense. This principle is set forth in Ohio Crim. R. 31, and is

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[7] This defendant passed up his federal and state guaranteed right to an appeal of the double-jeopardy issue before going through a separate trial. *Abney* v. *United States*, 431 U.S. 651, 97 S.Ct. 2034 (1977), *State* v. *Thomas*, 61 O.S.2d 254 (1980). It ill behooves him to complain about having to run the gauntlet again.

found also in Federal Rule of Criminal Procedure 31(C), and is embodied in the decisions of this Court. *Sansone* v. *United States*, 380 U.S. 343, 85 S.Ct. 1004 (1963); *Berra* v. *United States*, 351 U.S. 131, 76 S.Ct. 685 (1956); *Beck* v. *Alabama*, 447 U.S. 625, 100 S.Ct. 2382 (1980). The decision of the Sixth Circuit in this case can only be read as holding that an acquittal on a greater offense prevents the prosecution from proceeding to a verdict on a lesser inlcuded offense. This is totally contrary to anyone's reasoned interpretation of the double jeopardy clause, and this decision is certainly a "first" in this area. Petitioners submit that this decision is patently incorrect and should be summarily reversed by this Court.

CONCLUSION

The holding of the Sixth Circuit Court of Appeals in this case does major damage to some well settled tenets of the double-jeopardy clause. First of all, and in contravention of the previous decisions of this court, the majority below applied double-jeopardy principles to prevent a second trial where the first trial ended in a mistrial at the criminal defendant's request. It is as though this Court's decision in *Wade* v. *Hunter*, supra; *Gori* v. *United States*, supra; *Brock* v. *North Carolina*, supra; and *Oregon* v. *Kennedy*, supra, were never printed and disseminated. The majority below simply ignored the existence of the mistrial ruling, not even dealing with it in their opinion. The majority opinion below also found that the first trial ended in a ruling of acquittal by the trial court on the felony theft charge. The State trial and the appellate courts specifically found to the contrary, as did the U.S. Magistrate and the District Judge. [In fact, the Ohio trial court would have been in conflict with the Ohio Supreme Court if it granted an acquittal.] The Appellate Court had no basis in law or fact to disregard these findings. Their rejection of these findings is in conflict with this Court's decision in *Sumner* v. *Mata*, supra, and contrary to 28 U.S.C. § 2254(d). Finally, the majority opinion [as pointed out by petitioners and by the dissenting opinion] is written in complete disregard of the application of Ohio Crim. R. 31 and relevant decisions thereto, which provide for the continuation of trial on a lesser included offense [here misdemeanor theft] where an element of the greater offense is found to be missing. The opinion below simply ignored this point, though it was briefed and argued.

This case has been through the entire state and federal systems. The State of Ohio has prevailed on every occasion until the 2-1 decision by the Sixth Circuit Court of Appeals. The decision of the Court of Appeals is plainly wrong, and totally misconstrues the facts and law. However, the only way the State of Ohio can obtain a fair disposition of this case is for this Court to review this matter and see that its prior decisions are properly applied.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit in this matter.

Respectfully submitted,

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Of Counsel

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 86-3042

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RYAN HUNG-PING WANG,
Petitioner-Appellant,
v.
WILLIAM WITHWORTH; LINCOLN STOKES; ANTHONY J. CELEBREZZE,
Respondents-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed February 11, 1987

Before: KEITH and WELLFORD, Circuit Judges; and PECK, Senior Circuit Judge.

KEITH, Circuit Judge, delivered the opinion of the court, in which PECK, Senior Circuit Judge, joined. WELLFORD, Circuit Judge, (pp. 11a-14a herein) delivered a separate dissenting opinion.

KEITH, Circuit Judge. Petitioner-Appellant Ryan Hung-Ping Wang, a Chinese national, appeals the judgment of the United States District Court for the Southern District of Ohio, denying his petition for a writ of habeas corpus. The petition arises out of Wang's conviction and thirty-day prison sentence for misdemeanor theft in the second of two jury trials before the Court of Common Pleas, Hamilton County, Ohio. Wang was indicted in both the first and second trials

for grand theft under an enhanced felony statute, Ohio Revised Code § 2913.02(B).[1]

Wang's first trial on the enhanced felony charge ended in mistrial. In the second trial, the jury found Wang guilty of the lesser included offense of misdemeanor theft. In both trials a 1980 uncounseled misdemeanor conviction for shoplifting was proffered as the prior conviction element of the enhanced felony indictment. On appeal, the petitioner contends principally that the prosecution in the first trial lacked sufficient evidence to prove that his prior conviction was with the benefit of legal counsel, as required by *Baldasar* v. *Illinois*, 446 U.S. 222, 100 S.Ct. 1585 (per curiam), *reh'g denied*, 447 U.S. 930, 100 S.Ct. 3030 (1980). Therefore, Wang contends, the first trial, though termed a "mistrial", was in effect an acquittal. As a result, Wang argues, the second indictment on the same enhanced felony charge violated Wang's constitutional protections against double jeopardy. Finding merit in the petitioner's contentions, we reverse the judgment of the district court and grant his petition for habeas corpus.

I.

BACKGROUND

Wang, a citizen of the People's Republic of China, entered the United States in June, 1980 to attend college and obtain a bachelor's degree in mathematics. In October, 1980, Wang was convicted of petty theft after a guilty plea and fined fifty dollars. He was not represented by counsel in the proceeding. In December of 1982, Wang was arrested and charged with

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[1] The version of Ohio Rev. Code § 2913.02 in effect at the time of Wang's indictment provides in pertinent part:

> (A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either[.]
>
> (B) . . . If the offender has previously been convicted of a theft offense, a violation of this section is grand theft, a felony of the fourth degree.

the theft of fifteen greeting cards valued at sixteen dollars. Since Wang had a prior theft conviction, he was charged under Section 2913.02(B) with grand theft, a fourth degree felony. The first trial on the "enhanced" grand theft charge began in March, 1983. The State of Ohio entered in evidence a certified copy of the prior misdemeanor conviction. The state did not, however, produce the transcript of the proceeding nor did it dispute Wang's contention on objection that the 1980 conviction was uncounseled.[2]

After the state presented its case, Wang moved for acquittal and, alternatively, for a mistrial. In support of the acquittal motion, Wang contended that the state failed to meet its burden of proving that Wang's prior 1980 conviction was with the benefit of counsel. Since the state had not proven that counsel was present, Wang argued that his Sixth Amendment right to counsel had been violated and the prior conviction was not valid as an element of the enhanced grand theft charge.[3] The state trial court denied both motions but counsel for Wang renewed them after resting. Counsel for Wang based his acquittal motion on *Baldasar*. He argued that *Baldasar* prohibits the statutory "enhancement" of a misdemeanor to a felony with a prison term when the first proceeding resulting in the required prior conviction is without legal counsel. *See Baldasar*, 446 U.S. at 224, 100 S.Ct. at 1586 (Stewart, J. concurring). In response, the state argued that the burden of proving the absence of counsel at the time of the prior 1980 conviction remained with Wang. The state also argued in the alternative for the lesser included offense of petty theft.

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[2] Indeed, during oral argument in the district court the state admitted that the 1980 conviction was uncounseled. In any event, "[p]resuming waiver of counsel from a silent record is impermissible". *Burgett* v. *State of Texas*, 389 U.S. 109, 115, 88 S.Ct. 258, 262 (1967) (citations omitted).

[3] There is some dispute as to the grounds for the alternative mistrial motion. Wang insists that the "uncounseled prior conviction" ground supported both the acquittal and mistrial motions. The state argues that a mistrial was sought and granted due to prejudice of the appellant's case by the presentation of evidence and the testimony of numerous prosecution witnesses.

The state trial judge ruled on both of these motions from the bench, noting that the *Baldasar* case was "right on point". He stated further:

> [T]he record in this particular case, it would indicate to me that *there was no representation by a lawyer or that there was no formal waiving of any right to any attorney.* We run into a *classic Fifth and Sixth Amendment rights* [sic] in this particular case. *Baldasar*, and going all the way back to *Gideon* v. *Wainwright*, the right of counsel through the 14th Amendment, *and this being a specific element of the particular charge before the Court and there being nothing in the evidence before the Court by virtue of . . . the prior conviction, to show that he had an attorney, or that there was a waiver of right to counsel*, puts the Court between a rock and a hard spot.

(Emphasis added)

The judge then denied the motion for acquittal but granted "a motion for a new trial" on the grounds that the "admission of the evidence which was offered against the defendant obviously is prejudiced towards his [Wang's] rights in this particular case."

Wang was then indicted a second time on the same enhanced felony charge. Prior to the commencement of the second trial, Wang moved for dismissal on double jeopardy grounds and renewed his motion for acquittal. Wang's motions were again denied. At the second trial, the prior conviction was mentioned once by the visiting judge conducting the proceedings. After the state again produced no evidence of a prior conviction, the jury found Wang guilty of the lesser included offense of petty theft, sentenced him to thirty days imprisonment and fined him two hundred dollars plus costs.[4]

Upon Wang's subsequent appeal, the Ohio Court of Ap-

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[4] After conviction, Wang actually served twenty-one days of his thirty-day sentence before it was suspended pending appeal.

peals rejected his double jeopardy claim and affirmed the trial court. An appeal to the Ohio Supreme Court failed because the court found no substantial constitutional issue. Wang filed his petition for a writ of habeas corpus and obtained a stay of sentence from the federal district court. The district court entered judgment denying the writ in December 1985 and lifted its stay of execution of sentence the following January. After a flurry of motions to stay the execution of sentence in both the state court and federal court, this court entered an order staying execution of sentence pending appeal and also issued a certificate of probable cause upon Wang's motion in February, 1986.

II.

DISCUSSION

The central issue of this appeal is whether the state trial court's decision in the first trial to grant "a motion for a new trial" had the legal effect of a finding of insufficient evidence on the enhanced felony charge, thus barring the second trial (and conviction) on double jeopardy grounds.

To restate, Wang argued at trial that his prior uncounseled misdemeanor conviction in 1980 should not have been used to enhance a subsequent misdemeanor into a felony with a prison term, citing *Baldasar*. He contends now that the state trial court concurred with his view but did not follow the legal consequences of its ruling, namely an entry of an acquittal order which would bar retrial. Appellees contend that *Baldasar* prevents only the imposition of an enhanced prison term; thus, in their view, an enhanced felony *charge* may be brought against the petitioner, but not an increased felony *prison term*. As Wang received a thirty-day *misdemeanor* imprisonment term, there was no increase in the term imposed. Appellees argue further that the Double Jeopardy clause is not involved here because the state trial court's decision was a grant of Wang's alternative motion for mistrial, not an acquittal on the *Baldasar* issue.

We disagree. Although *Scott* v. *Illinois*, 440 U.S. 367, 99

S.Ct. 1158 (1979) held an uncounseled misdemeanor conviction to be constitutionally valid if a prison sentence is not imposed, *Baldasar* prohibits the use of that uncounseled conviction to "be used collaterally to impose an increased term of imprisonment". 446 U.S. at 226, 100 S.Ct. at 1587 (Marshall, J. concurring). The imposition by *Baldasar* of a "limited use" requirement on uncounseled convictions is a logical extension of the Court's decision in *Scott* and *Burgett* v. *Texas*, 389 U.S. 109, 88 S.Ct. 258 (1967). In *Scott*, the Court allowed uncounseled misdemeanor convictions but limited their effect to prevent incarceration of the accused. In *Burgett*, the Court prohibited admission of an uncounseled felony conviction as evidence in a subsequent trial. The court's holdings in *Baldasar*, *Scott* and *Burgett* each sought to avoid an indigent accused suffering from an earlier inability to benefit from legal counsel. In *Burgett*, for example, the Court noted that if the uncounseled felony conviction was admitted, "the accused in effect suffers anew from the deprivation of that Sixth Amendment right [to counsel]." 389 U.S. at 115, 88 S.Ct. at 262.

The *Baldasar* holding reaffirms the concerns raised in *Burgett* and *Scott*: "[a] petitioner's prior conviction [is] not valid for all purposes. Specifically, under the rule of *Scott* and *Argersinger*, it [is] invalid for the purpose of depriving petitioner of his liberty." 446 U.S. at 226, 100 S.Ct. at 1587 (Marshall, J., concurring) (citing *Argersinger* v. *Hamlin*, 407 U.S. 25, 92 S.Ct. 2006 (1972). Deprivation of liberty was precisely the object and purpose of the enhanced felony indictments in Wang's first and second trials in state court. It does not matter that Wang's prior misdemeanor conviction did not result in imprisonment. *Baldasar* clearly prevents the use of that uncounseled conviction to subject Wang to the possibility of increased imprisonment at a subsequent trial.[5]

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[5] *But see State* v. *Gerwin*, 69 Ohio St. 2d 488, 432 N.E.2d 828 (1982) (Because defendant was not imprisoned for the first misdemeanor conviction, *Baldasar* does not prevent the use of that first (uncounseled) conviction to enhance the second offense). We question the *Gerwin* holding in light of

Nor does it matter that Wang served twenty-one days of a thirty-day misdemeanor sentence rather than a more severe felony prison term.[6] The fact that Wang was sentenced to some period of incarceration does not prevent him from objecting to deprivations of liberty on the basis of an uncounseled conviction. *Baldasar*, 446 U.S. at 227, n.1, 100 S.Ct. at 1587, n.1. Moreover, as *Scott* and its predecessor case *Argersinger* require, this case is one where "an accused is deprived of his liberty", a case that "actually led to imprisonment even for a brief period". *Scott*, 440 U.S. at 373, 99 S.Ct. at 1162 (quoting *Argersinger*, 407 U.S. at 32, 33, 92 S.Ct. at 2010).[7] Accordingly, the protection of Sixth and Fourteenth Amendment rights provided by *Baldasar* must apply. *Id.; Baldasar*, 446 U.S. at 224, 100 S.Ct. at 1586 (Stewart, J. concurring); *State* v. *Elling*, 11 Ohio Misc. 2d 13, 15, 463 N.E.2d 668, 670 (1983) ("[T]he failure of the state to affirmatively show either a counseled conviction or a knowing and intelligent waiver of counsel, bars the use of the prior conviction to convict the defendant of the felony charge.")

The state trial court was thus correct when it determined that as a result of *Baldasar*, Section 2913.02(B) requires a prior counseled theft conviction as an essential element of the offense charged. *See Elling*, 11 Ohio Misc. 2d at 15, 463 N.E. 2d at 670.

Baldasar's apparent focus on imprisonment after the *second* conviction, *see* 446 U.S. at 224, 226, 228, 100 S.Ct. at 1586, 1587, 1588, rather than imprisonment after the first. *Cf. State* v. *Elling*, 11 Ohio Misc. 2d 13, 463 N.E.2d 668 (1983).

[6] If Wang had been convicted on the indictments in the first or second trials for grand theft, a fourth degree felony, sentencing guidelines then in effect would have subjected him to a prison sentence of six months at the minimum to a maximum of five years. By contrast, a conviction on a misdemeanor indictment would have subjected Wang to a *maximum* of six months' imprisonment. *See* Ohio Rev. Code § 2901 *et seq.*, accompanying *Table of Penalties*.

[7] *See Argersinger* 407 U.S. at 41, 92 S.Ct. at 2014 (Burger, C.J., concurring): "[A]ny deprivation of liberty is a serious matter".

Our next inquiry, then, is whether the trial court's decision was actually an acquittal or, as appellees contend, a grant of a mistrial based on prejudice. Wang, of course, contends that the trial court determined that the state lacked sufficient evidence on an essential element of the charge. The Supreme Court in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 97 S.Ct. 1349 (1977) stated that "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that a verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." 430 U.S. at 571, 97 S.Ct. at 1354 (quoting *United States* v. *Ball*, 163 U.S. 662, 671, 16 S.Ct. 1192, 1195 (1896)). In applying this principle, the Court counseled that "what constitutes an acquittal *is not to be controlled by the form of the judge's action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not*, of some or all of the factual elements of the offense charged." *Id.*, 97 S.Ct. at 1354, 1355 (citations omitted, emphasis added.).

The trial judge of the first trial, the Honorable Judge Donald Schott, submitted a certificate pursuant to 28 U.S.C. § 2245[8] stating that the trial court did not "believe that proof of the presence of counsel at the prior conviction was an essential element of the crime with which defendant was charged". The judge maintains that he granted a mistrial on the gounds that the "volume of testimony presented concerning the prior convictions had the potential to misdirect and confuse the jury". The trial court's certification is in marked contrast to the proceedings recorded at the first trial. There, the trial court noted that Wang's 1980 misdemeanor conviction was uncounseled. It also pointed out that the issue in-

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[8] 28 U.S.C. § 2245 provides in pertinent part:

> On the hearing of an application for a writ of habeas corpus . . . the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence.

volved "classic . . . Sixth Amendment rights", and that a prior counseled conviction was "a specific element of the particular charge before the court and there being *nothing in the evidence* before the court by virtue of . . . the prior conviction, to show that he had an attorney or that there was a waiver of right to counsel, puts the court between a rock and a hard spot".

The lack of evidence on the existence of counsel in the 1980 misdemeanor convictions does more than that; it operates as a resolution in Wang's favor of an essential element of the enhanced felony offense, the trial court's § 2245 certification notwithstanding. Though the trial court and appellees characterize the trial court's decision as a mistrial, the plain language of the proceedings following Wang's motion for acquittal and mistrial illustrates the trial court's recognition of the fatal shortcomings of the state's case against Wang. In light of our foregoing discussion on the requirements of *Baldasar*, we find such recognition to act as a finding of lack of sufficient evidence to convict.[9]

The appellees are incorrect when the attempt to characterize the trial court's decision as an order for retrial due to prejudice. Retrial is granted to correct trial error and the double jeopardy clause is usually not implicated, *see Burks* v. *United States*, 437 U.S. 1, 15, 98 S.Ct. 2141, 2149 (1978). The same cannot be said when the state's case has failed due to legal insufficiency of the evidence. Under those circumstances, the prosecution has already been given a fair opportunity to offer whatever proof it could assemble. If that opportunity is lost, the double jeopardy clause prevents the prosecution from obtaining a second "bite of the apple". *Burks*, 437 U.S. at 16, 98 S.Ct. at 2149, 2150.

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[9] The courts have broad discretion in this area. *Martin Linen* does not require us to evaluate whether or not the trial court's finding was correct, 450 U.S. at 564, 97 S.Ct. at 1354. As long as the trial court's determination was a resolution, correct or not, of the sufficiency of the evidence in the defendant's favor, this court may construe the determination as a de facto acquittal. *Id.*

The Supreme Court on similar facts in *Hudson* v. *Louisiana*, 450 U.S. 40, 101 S.Ct. 970 (1981) held that a subsequent trial was precluded by the Double Jeopardy Clause. In *Hudson*, as here, the nature of the trial court's ruling was in dispute. The court evaluated the statements of the trial judge and determined that the judge "granted the new trial because the state had failed to prove its case as a matter of law". *Id.* 450 U.S. at 44, 101 S.Ct. at 973. In the instant case, Wang moved for acquittal on the grounds that there was insufficient proof of a counseled conviction. In light of the trial court's comments in its ruling on the motion, noted *supra*, we find that it reached the same conclusion as the lower court in *Hudson*. By deciding that there was "nothing in the evidence before the court" on the issue of a prior counseled conviction, the trial court necessarily determined that as a matter of law Wang's criminal liability had not been established under Ohio's enhanced felony statute. *See Elling*. Since "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding", *Burks*, 437 U.S. at 11, 98 S.Ct. at 2147, Wang's second indictment and trial on the identical charge of an enhanced felony violated the Constitution's prohibition against double jeopardy. It does not matter that Wang was not convicted on either indictment for the fourth degree felony of grand theft. The Double Jeopardy Clause was designed to protect an individual as much from the hazards and tension of a second criminal prosecution as from actual conviction and imprisonment. *Id.* Accordingly, the state was barred by the Double Jeopardy Clause from prosecuting Wang in a second trial. His conviction and imprisonment resulting therefrom cannot stand.[10]

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[10] Wang's status as a citizen of the People's Republic of China does not, of course, affect this ruling. Except for several contexts governed by our immigration laws, Wang is accorded the same rights and privileges that any other accused receives under our Constitution's guarantee of due process. His exercise of those rights offer welcome proof that the vitality of these constitutional guarantees endure.

IV.

In light of the foregoing, this court REVERSES the order of the district court and GRANTS appellant Wang's petition for writ of habeas corpus.

WELLFORD, Circuit Judge, dissenting:

The primary issue in this case is whether Wang was in actuality acquitted of the enhanced felony charge during the first trial. If acquitted in legal effect, then double jeopardy bars retrial. If, however, the trial judge did not in fact find an insufficiency of the evidence to convict on the enhanced charge, but instead found that the evidence, as introduced, of the prior uncounseled conviction was sufficiently prejudicial that he could not allow the case to go to the jury on the lesser included offense of Theft of Property in violation of Ohio Rev. Code Ann. § 2913.02, then Wang's second trial and subsequent conviction are not barred by double jeopardy. We must interpret the trial judge's actions at the close of the first trial in which the trial judge expressly granted a "new trial," and denied Wang's motion for acquittal.

The trial judge was confronted with the choice of denying the defendant's motions and allowing the case to proceed to the jury on the lesser included offense (since he construed *Baldasar* to make conviction of the enhanced crime impossible[1]), granting the motion to acquit, or declaring a mistrial[2] due to prejudice. The trial judge was in the best posture to determine the proper course of action. His decision should not be overturned on appeal unless clearly erroneous: "[I]t would exceed the appropriate scope of review were we

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[1] Whether the trial court's interpretation of *Baldasar* v. *Illinois*, 446 U.S. 222 (1980), was correct or not is immaterial ir my view. *Baldasar*, correctly construed, would bar a conviction for the enhanced offense. It would not, however, have had any effect on the validity of a conviction, during the first trial, for the lesser included offense.

[2] The trial judge erroneously relabeled the defendant's motion for mistrial a "motion for new trial." The request was for a mistrial.

ourselves to attempt to pass an independent judgment upon the propriety of the mistrial, even should we be prone to do so[.]" *Gori* v. *United States*, 367 U.S. 364, 367 (1961).

The trial judge stated: "I believe from the evidence that the defendant was prejudiced, thereby, and prevented from having a fair trial. *On that basis* I am going to grant a motion for a [mistrial], and we will set it." It is clear that the judge granted the motion on the basis of prejudice—not on the basis that the state failed to prove its case.

> Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. *Simmons* v. *United States*, 142 U.S. 148; *Logan* v. *United States*, 144 U.S. 263; *Dreyer* v. *Illinois*, 187 U.S. 71, 85-86.

Gori, 367 U.S. at 368; *Brock* v. *North Carolina*, 344 U.S. 424, 427 (1953) ("This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served.") (citations omitted).

Even had the trial judge thought the State failed to prove its primary case, he could have allowed the case to go to the jury on the lesser included offense for which defendant Wang was later tried and convicted. *Oregon* v. *Kennedy*, 456 U.S. 667, 679 (1982); *see Wade* v. *Hunter*, 336 U.S. 684, 688-89 (1949):

> The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed.

Only the judge's perception that the defendant was unfairly prejudiced by the manner of proof about the prior conviction prevented the case going to the jury on the misdemeanor charge at the first trial. The judge responded to defendant's motion.

In this case "there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." *Wade*, 336 U.S. at 688-89. The trial judge himself, in a certificate "setting forth the facts occurring at the trial[,]"[3] stated that:

> This Court did not believe that proof of the presence of counsel at the prior conviction was an essential element of the crime with which defendant was charged, rather that factor would be pertinent at sentencing. Therefore, this Court denied the motion for acquittal, and made no finding on any elements of the crime charged.
>
> Because of the volume of testimony presented concerning the prior conviction, and its potential to misdirect and confuse the jury, this Court granted a mistrial on those grounds at the specific request of the defendant. (Transcripts of first trial, page 155-56)

On habeas review, "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State . . . were parties, evidenced by a written finding . . . *shall be presumed to be correct*, ..." 28 U.S.C. § 2254(d) (emphasis added). None of the eight exceptions to this rule under the statute apply. The Ohio state courts have found that the trial judge declared a mistrial due

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[3] 28 U.S.C.A. § 2245 clearly allows, in habeas corpus proceedings, a trial judge to set forth the facts. Wang's argument that the judge improperly "recharacterizes" the events is without merit. Congress recognized that at trial, where events move fast and the written record may inadequately reflect the true effect of the parties' actions, a trial judge's certificate may assist the federal court in reviewing a state conviction in a habeas corpus proceeding. I would not disregard the trial judge's certificate and would accord deference to the trial judge.

to testimony that unfairly prejudiced the defendant. To grant the writ in this case would fail to give the state courts' judgment a presumption of validity that Congress, and the Supreme Court, requires: "[The] interest in federalism recognized by Congress in enacting § 2254(d) *requires deference* by federal courts to factual determinations of all state courts." *Sumner* v. *Mata*, 449 U.S. 539, 547 (1981) (emphasis added). The trial judge granted a mistrial for the reasons stated and borne out on the record. I would deny the writ accordingly.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-84-0666

RYAN HUNG-PING WANG
2567 Erie Avenue
Cincinnati, Ohio 45208

Petitioner

vs.

WILLIAM WITHWORTH
Institutional Superintendent
Community Correctional Institute
3208 Colerain Avenue
Cincinnati, Ohio 45225

and

LINCOLN J. STOKES
Hamilton County Sheriff
320A Hamilton County Courthouse
Court and Main Streets
Cincinnati, Ohio 45202

and

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio
State Office Tower
30 E. Broad Street
Columbus, Ohio 43215

Respondents

CERTIFICATE OF TRIAL JUDGE
PURSUANT TO U.S.C. § 2245
(Filed May 1, 1984)

Pursuant to U.S.C. § 2245, respondents Withworth and Stokes submit the following Certificate of Trial Judge, from Judge Donald Schott.

Judge Donald Schott, a Judge of the Hamilton County Court of Common Pleas, certifies as follows concerning the case of *State of Ohio* v. *Ryan Hung-Ping Wang*, case number B-830233.

1. That I presided at the first trial in the case of *State of Ohio* v. *Ryan Hung-Ping Wang*, case number B-830233. Said trial took place on March 7 and 8, 1983, and was a jury trial. Defendant Wang was charged with a felony theft offense, to wit: theft with a prior, R.C. 2913.02(B).
2. During the trial of this cause, during its case in chief, the state presented two witnesses, Robert Scott and Gregory Brown, who established beyond a reasonable doubt, that the defendant committed a theft offense on December 3, 1982, at the Zayre Department Store in Hyde Park, Cincinnati, Hamilton County, Ohio.
3. During the trial of this cause, during its case in chief, the state presented five (5) witnesses, to establish the existence of a prior theft offense. Those witnesses were; William Hilliard, James Haney, Benny Pfeifer, Steven Flammer, and Marion Maay. These witnesses established, beyond a reasonable doubt, that on October 21, 1980, in case number 80 CRB 27121, defendant Wang was convicted of theft in the Hamilton County Municipal Court.
4. The state's evidence was silent as to whether defendant was represented by counsel at the time of the earlier theft conviction.
5. At the close of the state's case and after resting, defendant made a motion for acquittal and a motion for a mistrial. The motion for acquittal urged that the state had failed to prove an essential element of the crime

charged, to wit: that defendant had counsel at the time of his prior conviction. The motion for mistrial urged that the volume of testimony concerning the prior conviction would prejudice and confuse the jury.

6. This Court did not believe that proof of the presence of counsel at the prior conviction was an essential element of the crime with which defendant was charged, rather that factor would be pertinent at sentencing. Therefore, this Court denied the motion for acquittal, and made no finding on any elements of the crime charged.
7. Because of the volume of testimony presented concerning the prior conviction, and its potential to misdirect and confuse the jury, this Court granted a mistrial on those grounds at the specific request of the defendant. (Transcript of first trial, page 155-56)

I certify that the above is a correct and accurate account of the trial in *State* v. *Wang*, B-830233, at which this Judge presided.

/s/ JUDGE DONALD SCHOTT

Dated: April 30, 1984

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CIVIL NO. C-1-84-0666 (R)(A)

RYAN HUNG-PING WANG,
Petitioner,

v.

WILLIAM WITHWORTH
Institutional Superintendent,
LINCOLN J. STOKES
Hamilton County Sheriff,
and
ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio,
Respondents.

REPORT AND RECOMMENDATION OF THE MAGISTRATE

This matter is before the Court on the parties' cross-motions for summary judgment (docs. 15, 16). Petitioner moves for summary judgment pursuant to Fed. R. Civ. P. 56(a) on all claims in the petition against all respondents under 28 U.S.C. § 2254 for a writ of habeas corpus (doc. 15). Respondents argue that there are no factual issues to be resolved through the taking of further evidence and that the petition for writ of habeas corpus should be denied (doc. 16). The United States Magistrate has carefully reviewed all of the pleadings filed in this case and, in addition, has conducted a hearing in open court and thus considers also the oral arguments of the parties.

FACTS

Petitioner Wang was indicted for the theft of fifteen greeting cards from a Zayre's Corporation store on December 3, 1982. Petitioner had a prior conviction of petty theft on October 21, 1980 which, under Ohio law, made the 1982 offense grand theft, a fourth degree felony. *See* OHIO REVISED CODE § 2913.02(B).

Petitioner was tried twice in 1983 as a result of the grand theft charge. At the first jury trial which began March 7, 1983, the state presented seven witnesses, two of whom testified that they had seen petitioner Wang take the greeting cards, conceal them, and leave the store without paying for them. The other five witnesses testified about petitioner's 1980 conviction and identified him as the offender in that proceeding. A certified copy of the prior conviction, disclosing that petitioner pled guilty to a charge of petty theft and was fined fifty dollars and costs, was admitted into evidence. There was no evidence indicating whether or not petitioner was represented by, or duly waived, counsel.

At the close of the state's case, petitioner moved for acquittal under Crim. R. 29(A), arguing that the state did not meet its burden of proving petitioner's right to counsel was not violated and that the failure to do so meant the enhancing element of a prior conviction was not proved. Petitioner also moved, in the alternative, for a mistrial on the grounds that he was prejudiced by so many witnesses. The court denied both motions. The defense presented no evidence and renewed both motions.

The trial judge, Judge Schott, then ruled on the motions from the bench. On appeal to the First Appellate District of Ohio, Judge Black stated that Judge Schott "expounded on [the motions], seeming at one point to acknowledge that there was a problem about the validity of the prior conviction, and at another point, that the amount of evidence was so prejudicial to defendant, without taking into consideration the sufficiency of the evidence to establish the prior conviction, that the jury was 'misdirected' and no corrective instruction could cure that prejudice" (Appendix to doc. 6, pp. 32-33).

Judge Schott concluded, "I believe from the evidence that the defendant was prejudiced, thereby, and prevented from having a fair trial. On that basis I am going to grant a motion for a new trial . . ." (Appendix to doc. 6, p. 50). Judge Schott, in a subsequent judgment entry, found that petitioner was prejudiced by the evidence offered against him and was prevented from having a fair trial, adding that the evidence did not reveal that petitioner had an attorney or knowingly and voluntarily waived his right to counsel at the time of the alleged prior conviction (Appendix to doc. 6, pp. 51-52). The judge expressly denied the motion for acquittal made at the close of evidence and granted the alternative motion for a new trial.

On April 30, 1984 Judge Schott filed a Certificate of Trial Judge pursuant to 28 U.S.C. § 2245, stating that the court did not believe that the presence of counsel at a prior conviction was an essential element of the crime with which the defendant was charged and that the court granted a mistrial because of the potential of the testimony to misdirect and confuse the jury (Appendix to doc. 6, pp. 57-58).

Petitoner was tried for a second time on March 23, 1983 after the trial judge denied petitioner's renewed motion for acquittal and his motion to dismiss for double jeopardy. The prior conviction was mentioned only once by the visiting judge who conducted petitioner's second trial. The jury found petitioner guilty of petty theft, sentenced him to thirty days in jail, and ordered him to pay a fine of $200.00 and costs.

The Ohio First District Court of Appeals rejected petitioner's double jeopardy claim and affirmed the trial court's decision. The Ohio Supreme Court declined jurisdiction, finding that the appeal presented no substantial constitutional issue. Petitioner then filed the present action in this Court and obtained a temporary stay of execution of the state sentence.

DISCUSSION

Petitioner contends that the trial court made an evidentiary finding that the state had failed to prove the 1980 conviction

was constitutionally valid even though the motions to acquit were overruled. He argues that a second trial was thus barred by the double jeopardy clause. The state counters that no such evidentiary ruling was made, that the trial judge merely granted a mistrial, and that no factual issues remain to be resolved (doc. 16, p. 2).

The basic issue is whether the trial judge's termination of the trial was, as the judge expressly stated, a mistrial or whether it was, as petitioner contends, an acquittal, conveniently characterized as a mistrial to permit the state to retry petitioner.

The Ohio Court of Appeals found that because petitioner's prior conviction did not result in imprisonment or deprivation of liberty, it could be used to enhance the penalty in a subsequent offense. The court further found that, irrespective of the penalty imposed in the prior conviction, a factual finding that petitioner was uncounseled was unnecessary and that the burden of going forward with the existence of constitutional violation, once the state has proved the existence of a prior conviction and the defendant's identification as the convicted person, should be on the defendant (Opinion of Black, J., Appendix to doc. 6, p. 36). The court recognized that an element of doubt had been introduced by the trial judge's comments but concluded that the substantive effect of the judge's ruling was not to acquit petitioner but to declare a mistrial because petitioner requested it and because the evidence was needlessly cumulative.

Judge Palmer agreed with the majority's overruling of the Criminal Rule 29 motion and to its finding of no "vindictive and retaliatory" reprosecution; however, he did not agree with the majority's disposition of the double jeopardy issue (Palmer, J., dissenting, Appendix to doc. 6, p. 42). Judge Palmer stated that petitioner could be retried without prejudice if the proceedings were terminated because petitioner was prejudiced by the testimony regarding the prior conviction, *see United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977), but that if the reason for declaring a mistrial was that the trial judge believed the state had failed to prove that

defendant had the benefit of or had waived counsel at the time of the prior conviction, the prior conviction was a nullity and defendant could not constitutionally be retried (Appendix to doc. 6, p. 44). Judge Palmer pointed out that the double jeopardy bar would apply whether or not the trial court was legally correct in concluding that the state had failed in carrying its burden. *See Sanabria* v. *United States*, 437 U.S. 54 (1978). He concluded, from the judgment entry and from the "ruminations of the court" following an oral renewal of the motions for acquittal and for a mistrial, that the trial court terminated the trial because defendant was prejudiced by the number of witnesses and because the state failed to prove the enhancing element of a constitutionally valid prior conviction (Appendix to doc. 6, p. 45).

Petitioner urges this Court to take the majority opinion "with a grain of salt" (oral argument) and to adopt Judge Palmer's conclusions and grant summary judgment for petitioner as a matter of law (doc. 15). Petitioner relies on *Martin Linen Supply Co.*, 430 U.S. at 571, for the proposition that, for double jeopardy purposes, a finding of insufficient evidence to go to the jury is an acquittal whether or not the court chooses to call it that. Petitioner also rejects Judge Schott's certification as "hindsight recharacterization" (doc. 12, p. 38) and as a "self-serving statement of a 'wounded' trial judge" (doc. 12, p. 42). Petitioner concludes that the trial court, correctly or not, resolved a factual element of the offense charged and that the state is barred by double jeopardy from successive prosecution for the same offense — even though defendant moved for retrial.

We find, however, that the trial judge did just what he said he did. He denied petitioner's motion for an acquittal and granted his motion for a retrial. We find that the preliminary statements made by the trial judge from the bench were correctly characterized by Judge Palmer as "ruminations of the court" before stating its final decision. Judge Schott unequivocally concluded his comments from the bench by stating, "I believe from the evidence that the defendant was prejudiced, thereby, and prevented from having a fair trial.

On that basis I am going to grant a motion for a new trial, and we will set it" (Appendix to doc. 6, p. 50).

Further, petitioner's motion for acquittal was on the ground that the state had failed to prove an essential element of the crime charged, that is, that defendant had counsel at the time of his prior conviction. The motion for mistrial was based on the possibility that the volume of testimony concerning the prior conviction would prejudice and confuse the jury. In both his statement from the bench and the judgment entry, the trial judge clearly differentiated between the motion for acquittal which he denied and the motion for a mistrial which he granted.

Judge Palmer concluded that the trial judge selected from a variety of causes for termination of a trial one that would not inhibit a retrial of the defendant. Thus Judge Palmer gave little weight to what the trial judge said, basing his conclusion on what he determined "quite probably was what was in the trial court's mind when he aborted the proceedings in question" (Appendix to doc. 6, p. 45).

It is settled law that where a trial judge or appellate court grants a motion to acquit which is based on a failure of evidence, a retrial is barred. *United States* v. *Martin Linen*, 430 U.S. 564 (1977). An exception to double jeopardy exists, however, when a prosecution ends in a mistrial. *Arizona* v. *Washington*, 434 U.S. 497 (1978); *Illinois* v. *Somerville*, 410 U.S. 458 (1973); *United States* v. *Jorn*, 400 U.S. 470 (1971). Where a mistrial is requested by a party other than the defendant, the trial court must exercise its discretion in determining whether there is a "manifest necessity" for the action, or whether the "ends of justice require such action." *Wade* v. *Hunter*, 336 U.S. 684, (1949). Where the defendant himself requests a mistrial, it will be an extremely rare situation where jeopardy will prevent a mistrial. *Oregon* v. *Kennedy*, 456 U.S. 667 (1982). A defendant's own motion for a mistrial is a deliberate choice on his part to give up his right to have the first jury determine his fate. *United States* v. *Scott*, 437 U.S. 82 (1978).

Petitioner in the present case requested a mistrial on the

grounds that an excessive number of witnesses testified regarding the prior conviction and that any instruction by the court would be too late to cure the prejudice that might result from the jury hearing those witnesses. The trial court granted the motion for that reason. We therefore find it unnecessary to try to figure out, as Judge Palmer did, "what was in the trial court's mind when he aborted the proceedings . . ." (Appendix to doc. 6, p. 45). Because we find that a mistrial was declared, we also find that no genuine issue as to any material fact remains to be decided in this case.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Accordingly, it is RECOMMENDED to the District Judge that petitioner's motion for summary judgment be DENIED and the respondents' motion for summary judgment be GRANTED.

/s/ J. VINCENT AUG, JR.
United States Magistrate

Supreme Court, U.S.
FILED
APR 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1624

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM WITHWORTH, LINCOLN J. STOKES, and ANTHONY J. CELEBREZZE, JR.,
Petitioners,

v.

RYAN HUNG-PING WANG,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent respectfully submits that the decision below and the factual record do not raise the questions presented for review in the Petition For Certiorari for the reasons set forth below. Should the Supreme Court decide that it may take jurisdiction, only the following questions would be presented:

1. WHETHER THE STATE MAY RETRY A CRIMINAL DEFENDANT FOR THE SAME ENHANCED FELONY OFFENSE AND IMPRISON HIM FOR THE LESSER INCLUDED MISDEMEANOR AFTER THE FIRST TRIAL IS TERMINATED BY FINDINGS AND A RULING, WHETHER CORRECT OR NOT, THAT THE STATE HAD FAILED TO PROVE THE ESSENTIAL ENHANCING ELEMENT OF THAT OFFENSE, A PRIOR COUNSELED CONVICTION.

2. WHETHER A CERTIFICATE OF THE TRIAL JUDGE UNDER 28 U.S.C. § 2245 MAY BE USED TO CHANGE THE TRIAL RECORD.

3. WHETHER THE STATE COURT'S FINDINGS AND RULINGS, WHETHER CORRECT OR NOT, OPERATED AS AN ACQUITTAL.

4. WHETHER THE STATE MAY REQUIRE A CRIMINAL DEFENDANT TO CARRY THE BURDEN OF PROOF TO SHOW THAT A PRIOR CONVICTION WAS NOT COUNSELED WHEN IT IS AN ESSENTIAL ELEMENT OF THE OFFENSE.

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NO. 86-1624

IN THE

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OCTOBER TERM, 1986

WILLIAM WITHWORTH, LINCOLN J. STOKES, and ANTHONY J. CELEBREZZE, JR.,

Petitioners,

v.

RYAN HUNG-PING WANG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Ryan Hung-Ping Wang, respectfully requests that the Supreme Court deny the Petition For Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit in this case. That opinion is reported at 811 F.2d 952 (6th Cir. 1987). Petitioners' Motion For Rehearing and for Rehearing En Banc was also denied by the Sixth Circuit. See Appendix A.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, entered on February 11, 1987, is officially reported at 811 F.2d 952 (6th Cir. 1987), and the slip opinion is attached to the Petition as Appendix A. The Sixth Circuit's Order, entered March 27, 1987, denying rehearing and rehearing en banc is attached hereto as Appendix A. The order

of the United States District Court for the Southern District of Ohio, Western Division, entered on December 27, 1985, is not officially reported, but it adopted the United States Magistrate's opinion, which is attached to the Petition as Appendix C. The Supreme Court of Ohio declined to exercise discretionary jurisdiction, by judgment but without opinion. The unreported opinion of the Ohio Court of Appeals, First Appellate District, entered January 25, 1984, is attached hereto as Appendix B.

CONSTITUTIONAL PROVISIONS AND STATUTES

The most pertinent Constitutional provisions and statutes, as well as several irrelevant ones, are included in the Petition.

STATEMENT OF THE CASE

Petitioners' statement of the proceedings in state court and facts is substantially misleading. An accurate, if abbreviated, statement may be found in the Sixth Circuit opinion, 811 F.2d at 953-55. Constitutional procedural issues of what happened in the trial court on Respondent's motions, not factual issues of guilt or innocence, comprise this case. The factual record of what occurred in the Ohio trial court is what created the legal controversy in all of the courts below: whether the trial court granted an acquittal (whether correct or not) or a mistrial. However, the Petition sets forth an attempt to prove Respondent's guilt, which is irrelevant to the Constitutional protections defined by the Sixth Circuit below. The facts which are at issue are Constitutional and procedural and relate to whether the state trial judge, whether correct or not, resolved facts in Respondent's favor and whether Respondent was twice prosecuted for the same felony theft offense, after which he was imprisoned for the lesser included offense. Contrary to Petitioners' statement of facts, the U.S. Court of Appeals determined, as a matter of fact, as well as law, that Respondent was acquitted by the state trial court. Whether the state court was correct is irrelevant.

The Petition incorrectly asserts that in Respondent's second state court trial on the felony offense, "No mention was made, nor testimony presented as to the prior offense." (Petition at 10) Petitioners wrongly imply that the reprosecution was only for the lesser included misdemeanor. As in the courts below, Respondent must again correct this misstatement, quoting directly from the record, which shows that the court itself, as well as counsel, advised the jury that the second prosecution was a felony prosecution premised upon a prior conviction. (R. 12A: Reply Memorandum In Support Of Petition For Habeas Corpus at 4; R. 14: Second Volume of Trial Transcript of Proceedings at 5) (hereinafter cited as "T.P. ____")[1] The state trial court at the reprosecution in its instruc-

[1] Respondent follows the same method of citation to the record as in the Petition, page 6, footnote 2.

tion to the jury said that the second trial was, indeed, an enhanced felony prosecution:

> [T]he charge in this case involved the theft, the allegations being that the Defendant was guilty of a theft, and *on a prior occasion was guilty of another theft. Those are the issues that will be tried.* As the facts for the jurors to determine as judges of the facts of the case. That is the nature of the case. [R. 14: 2 T.P. 5 (emphasis added)]

The Ohio Court of Appeals, moreover, explicitly interpreted the record to find that "Wang was brought to the second 1983 trial for grand theft as set forth in the indictment, not for the reduced charge of petty theft." (R. 14: doc. 44, Opinion at fn.7; Appendix B)

The Petition's purported statement of facts also fails to mention that Respondent actually served a prison term of twenty-two days of his thirty-day sentence when the State successfully opposed bail before Respondent was released on bail pending his state appeal and again during proceedings in the district court. He was briefly reincarcerated following the district court's judgment and before the Sixth Circuit granted a stay of sentence pending appeal. Thus, Respondent's felony reprosecution resulted in actual imprisonment, if that is a test of prejudice following his reprosecution on the basis of a prior uncounseled conviction.

Petitioners mischaracterize the state trial court's ruling. The trial court's complete ruling in the trial transcript is omitted by Petitioners and may be reviewed in the appendix to the Ohio Court of Appeals opinion, attached hereto as Appendix B. That record was thoroughly analyzed by the Sixth Circuit. The Petition mischaracterizes the state trial court's ruling as a mistrial when, in fact, the state trial court, as well as the Sixth Circuit, rejected that label. The state trial court labeled its ruling a "new trial". (R. 14: 1 T.P. 162; R. 14: doc. 10, Judgment Entry). The Sixth Circuit agreed with Respondent that the state court's ruling on the record and by judgment entry was not a mistrial, but an acquittal. (Petition at 8a, 811 F.2d at 957)

Petitioners would like to have this case resolved on the so-called mistrial exception to the Double Jeopardy Rule by glossing over the facts of the state court record and the rationale expressed even by the state trial court in its decision to terminate the first trial. The state trial court relied on and cited Respondent's authority for acquittal, but called its ruling a new trial. It did not grant the alternative mistrial. Although the court's label has no control over the legal effect of its ruling, the state trial court thought there was a difference. Petitioners try to make the record appear simplistic by omitting the key parts of it, citing only the entry, and thus try to evade the constitutional issues involved and applied to all the facts by the Sixth Circuit below.

Furthermore, the Petition mischaracterizes the factual basis in the record for Respondent's alternative motion for a mistrial by omission at page 8 of their brief of the essential part of counsel's motion. The complete motion for acquittal may be found at R. 14: Stipulation of Record, doc. 1: 1 T.P. 154-156, 161. Respondents' alternative motion for a mistrial (which was overruled) was expressly stated to be based, not on procedural errors such as prejudice from the number of witnesses or exhibits, but squarely on the "matters relating to the prior conviction, which at this stage of the case has not resulted in any proof of that element of the crime." (R. 14: 1 T.P. 155) Respondent was clear that all of his motions were based not on extrinsic prejudice, which might support the mistrial exception to the Double Jeopardy Rule, but on the inherent insufficiency of proof of an element of the offense charged by virtue of the State's failure to prove that the prior conviction was counseled. Nowhere in the record does it appear that Respondent made his mistrial motion solely on the ground that the "volume" of the witnesses as to the prior conviction was prejudicial. Only the Petition's selective quotation from the record presents the case in such false light.

Of course, where the State has attempted through testimony and exhibits but has failed to prove an essential element of the offense, the testimony and exhibits concerning that element are inherently prejudicial because they are ir-

relevant. The whole point of Respondent's motions for acquittal and mistrial in the first prosecution was that none of the testimony was relevant because under *Baldasar* v. *Illinois*, 446 U.S. 222, 100 S. Ct. 1585 (1980), it did not establish an element of the felony offense charged, a prior counseled conviction. Even if the State had produced only one witness testifying to the prior conviction, that testimony would have been inadmissible and inherently prejudicial unless it could also be shown that the prior conviction was counseled, for only then would the evidence be relevant as proof of an element of the felony charge.

The Petition wrongly suggests in its purported facts on page 7 that Respondent waived his double jeopardy rights by failing to appeal from the court's denial of his first motion to dismiss for double jeopardy. The record shows that the entry denying that first motion was not entered until after the second trial (R. 14: doc. 11, Judgment Entry of March 31, 1983), so there was nothing from which Respondent could then appeal. Respondent appealed from the denial of his double jeopardy motion the day after that judgment was entered in the docket of the state trial court. He did not even take the jurisdictional maximum time allowed, but appealed as soon as there was a judgment from which to appeal — which was after the second trial. (R. 14: doc. 16, Notice of Appeal)

In short, Petitioners assert as fact that a mistrial was granted by the state trial court, when the United States Court of Appeals for the Sixth Circuit, having considered Petitioners' arguments and having carefully and thoroughly interpreted the factual record, determined that the state court as a matter of fact acquitted Respondent of the felony charge at the first trial. (Sixth Circuit opinion, Petition at 8a, 811 F.2d at 957). In support of their argument, Petitioners belatedly rely upon the certificate of the state court trial judge, which the Sixth Circuit expressly found as a matter of fact was "in marked contrast to the proceedings recorded at the first trial," (Opinion, Petition at 8a, 811 F.2d at 957). The Sixth Circuit found that the trial court's post-trial certificate was

impermissible to vary the transcript of the proceedings and the record at the trial. This Court should not take issue with these factual determinations carefully made by the Sixth Circuit below.

REASONS THAT THE WRIT SHOULD BE DENIED

1. THE DECISION BELOW TURNS ON FACTS UNIQUE TO THE RECORD IN THIS CASE, AND NOT ON ANY NOVEL OR UNUSUAL LEGAL POSITION, AND THE SUPREME COURT SHOULD NOT REVIEW A DIFFICULT AND DISPUTED FACTUAL RECORD THAT OBVIOUSLY CREATED DISAGREEMENTS IN THE STATE AND FEDERAL COURTS BELOW.

Even were this Court inclined to believe that the Sixth Circuit erred in its interpretation of law, the Court ought to decline to exercise its discretionary jurisdiction in this case. Apart from the fact that the crime involved the theft of sixteen dollars of Christmas cards and that Respondent was incarcerated during the proceedings below for twenty-two days, the unusual and unique facts comprising the state trial court record in this case constitute a factual complex in which this Court should not attempt to clarify or formulate double jeopardy or other Constitutional principles. The decisions below at each stage, including in the Sixth Circuit, turn in large measure on factual questions requiring interpretation of the record and what actually took place in the state trial court. By virtue of one dissenting judge in the Ohio Court of Appeals, two dissenting judges in the Ohio Supreme Court, and one dissenting judge in the Sixth Circuit, this is not an unambiguous record upon which this Court should resolve dear and delicate Constitutional principles. The Court's discretionary jurisdiction should not be exercised to settle a factual dispute about the record.

There are no far-reaching consequences of the opinion below other than to resolve the questions arising from this peculiar record. The Sixth Circuit fully considered and disposed of all of Petitioners' arguments and denied rehearing and rehearing en banc. No novel or overriding interpretations of applicable double jeopardy or other Constitutional legal issues are involved, other than the factual issue, as even the Petition makes clear in its single-minded focus on the argu-

ment that the Sixth Circuit erred in its interpretation of the record, rather than in its interpretation of the controlling substantive authorities. The opinion below is factually specific and therefore lacks the importance in effect and implication that is necessary to justify the granting of the Petition. Even if the Sixth Circuit is wrong in its interpretation of the record, its decision will have no impact in other cases whose records are not likely to compare with the particular action of the state trial court in this case. Even if this Court believes that the legal issues below were wrongly decided, the Court should not resolve them in a case which turns on such a unique and troublesome state trial court record.

2. PETITIONERS HAVE OMITTED TO EXPLAIN ESSENTIAL FACTS IN THE RECORD BUT INSTEAD HAVE PRESENTED ONLY THOSE PORTIONS OF THE RECORD THAT SUPPORT THEIR ARGUMENT, AND THE SUPREME COURT SHOULD NOT GRANT CERTIORARI TO SETTLE A FACTUAL DISPUTE BETWEEN THE PARTIES ABOUT THE RECORD WHERE NO NOVEL LEGAL ISSUES ARE INVOLVED.

Petitioners have omitted pertinent citations to and quotations from the record, which the Supreme Court would have to analyze and interpret in considering this case on the merits. By their selective statement of the case, Petitioners raise inapposite issues. In suggesting that the first trial ended in a "mistrial", Petitioners' first question presented for review factually contradicts the findings of the state trial court, which granted a "new trial", and the findings of the Sixth Circuit, which thoroughly analyzed the record and determined that the trial did not end in a mistrial but an acquittal.

Petitioners' second question presented for review is inappropriate because it suggests that the state trial court could have and should have continued to a determination on a lesser included offense. The decision to terminate the trial in-

stead of proceeding on the misdemeanor was made by the state trial court, and if Petitioners dispute the result, their dispute is with the state trial court, from which they did not appeal.

The third question presented by the Petition simply ignores what the Sixth Circuit did. The Court of Appeals did not "reject findings of fact" made by the state court but, on the contrary, affirmed and followed them by concluding that the state court, whether correct or not, resolved issues of fact in favor of Respondent, thus requiring that the consequences of its ruling be an acquittal. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 97 S. Ct. 1349 (1977).

This Court should not review the opinion below for the purpose of correcting the Sixth Circuit's evaluation of a state court's factual findings, even were it inclined to conclude that the Sixth Circuit erred. At most, the Court would conclude that the Sixth Circuit incorrectly interpreted the facts in the state court record, for essentially the dissenting judge below simply disagreed with the majority's analysis of that record and, instead, would have interpreted the record differently. Such factual analysis, although of critical importance to Respondent, in no way justifies a writ of certiorari.

3. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISON OF THIS COURT OR ANY OTHER CIRCUIT BUT ACCURATELY AND CORRECTLY APPLIES THE APPLICABLE LAW.

The Petition does not suggest a conflict between the opinion below and any decision of this Court or any other circuit, except in the Petition's interpretation of the facts and in its undying yet factually unsupported argument that a mistrial was granted. At most, the Sixth Circuit's decision is inconsistent with a decision of the Ohio Supreme Court in *State of Ohio* v. *Gerwin*, 69 Ohio St. 2d 488, 432 N.E. 2d 828 (1982), which was expressly questioned by the Sixth Circuit in its

opinion. (Petition at 6a-7a, fn.5, 811 F.2d at 956 fn.5). Indeed, the Petition's argument that the writ of habeas corpus was wrongly granted depends upon the Petition's assertion that the Sixth Circuit opinion below is in conflict with the law of Ohio.

While it may be true that the failure of the State to prove its case on the greater offense would not have prevented the trial from proceeding on the lesser included misdemeanor offense under certain circumstances, the state trial court affirmatively chose, even if erroneously, to terminate the trial and to dismiss the jury. Even if this were not an acquittal on the misdemeanor, the fatal and dispositive flaw in Petitioners' argument is that they made a conscious, deliberate choice not to appeal the court's judgment but instead chose to reprosecute Respondent for the enhanced felony offense, rather than to reprosecute him for the misdemeanor. Thus, he was twice prosecuted for the same felony theft offense, after an acquittal of the offense at the first trial, thus violating double jeopardy. The state is not permitted a second chance to prove what it first failed to prove. *Burks* v. *United States*, 437 U.S. 1, 98 S. Ct. 2141 (1978). As a result of the reprosecution, Respondent suffered actual imprisonment. The record below simply does not support the Petition's repeated assertions that the first state court prosecution was terminated by a mistrial granted at Petitioner's request. The Sixth Circuit found and ruled that there was no mistrial. Unlike the situation in *Morris* v. *Mathews*, 475 U.S. ____, 106 S. Ct. 1032 (1986), there was no guilty plea to a lesser offense and then a new prosecution for a greater offense. Here the prosecution, knowing that the prior conviction was uncounseled and that a prior counseled conviction could not possibly be proved, affirmatively chose to reprosecute Respondent for the very same felony theft offense after his first prosecution was terminated because of the State's inevitable failure to prove that essential element of the enhanced felony theft offense. That is the distinction ignored throughout the Petition.

CONCLUSIONS

The holding of the United States Court of Appeals for the Sixth Circuit is entirely consistent with decisions of this Court and turns upon a unique factual record created by Petitioners' conscious, deliberate decision to prosecute Respondent twice for the same enhanced felony theft offense, enhanced on the basis of a prior uncounseled conviction and after the trial court at the first trial had expressly determined that the state had failed to prove that essential element of the offense. Whether the state court was correct or not, the unique factual circumstances make this case one not deserving of discretionary review by this Court, despite the presence of very significant Constitutional principles. Petitioners do not raise substantial legal questions, but only factual issues as to what the record in the state court means and how the record should be interpreted in light of applicable law.

For these reasons, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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April 1987

APPENDIX A

No. 86-3042

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RYAN HUNG-PING WANG,
Petitioner-Appellant,

v.

WILLIAM WITHWORTH, LINCOLN STOKES,
ANTHONY J. CELEBREZZE,
Respondent-Appellees.

Before; KEITH and WELLFORD, Circuit Judges, and PECK, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman, Clerk

APPENDIX B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

RYAN HUNG PING WANG,
Defendant-Appellant.

APPEAL No. C-830287
TRIAL No. B-830233

OPINION
(Filed January 25, 1984)

Criminal Appeal from Court of Common Pleas
Judgment appealed from is: Affirmed
Date of Judgment entry on Appeal: January 25, 1984

Messrs. Arthur M. Ney, Jr. and William E. Breyer, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Taft, Stettinius & Hollister, Daniel J. Hoffheimer of counsel, 1800 First National Bank Center, Cincinnati, Ohio 45202, for Defendant-Appellant.

BLACK, J.

Two principal questions are raised by this case, under an indictment charging defendant-appellant Ryan Hung Ping Wang (Wang) with theft of fifteen greeting cards from Zayre's Corporation on December 3, 1982, when he had a prior conviction of petty theft on October 21, 1980. R.C.

2913.02[1] The prior conviction made the 1982 offense grand theft, a fourth degree felony. The first question is whether the state presented sufficient evidence to prove the prior conviction, when the evidence about it failed to disclose whether Wang was represented by counsel in 1980.

Two jury trials were held in 1983 on the charge of grand theft. The second principal question is whether the second 1983 trial violated Wang's constitutional right against double jeopardy, a question that depends on an analysis of the meaning and effect of the trial court's termination of the first 1983 trial. Did the court make a factual finding that the evidence was insufficient to support a conviction, or did it grant a mistrial by reason of overwhelmingly prejudicial evidence?

In brief, we hold that the evidence was sufficient to prove grand theft, that a mistrial was declared for good and sufficient reason and at Wang's request, and that the second 1983 trial did not violate the guarantee against double jeopardy.

I.

At the jury trial which began March 7, 1983, the state presented seven witnesses, two of whom had seen Wang take

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[1] R.C. 2913.02 reads in pertinent part:

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either:

(1) Without the consent of the owner or person authorized to give consent;

* * *

(B) Whoever violates this section is guilty of theft. If the value of the property or services stolen is less than one hundred fifty dollars, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is one hundred fifty dollars or more, or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, or *if the offender has previously been convicted of a theft offense, a violation of this section is grand theft, a felony of the fourth degree.* If the property stolen is a motor vehicle, as defined in section 4501.01 of the Revised Code, a violation of this section is grand theft of a motor vehicle, a felony of the third degree. (Emphasis added.)

the greeting cards from Zayre's rack, place them under the back of his pants belt, pull his jacket over them and leave the store without paying for them. The other five witnesses testified about Wang's 1980 conviction for petty theft and identified him as the offender in that proceeding, by personal recognition, fingerprints and mug shot. A certified copy of that prior conviction was presented and accepted in evidence, which disclosed that on October 21, 1980, Wang pled guilty to a charge of petty theft and was fined $50 and costs. The evidence about this prior conviction, however, failed to indicate whether or not Wang was represented by, or duly waived, counsel; there simply was no evidence about counsel.

At the close of the state's case, Wang made two motions. The first was a motion for acquittal under Crim. R. 29(A), in support of which Wang claimed that he should be acquitted, because the evidence failed to establish a valid prior conviction. Citing *Burgett* v. *Texas* (1967), 389 U.S. 109, 88 S. Ct. 258, and *Baldasar* v. *Illinois* (1980), 446 U.S. 222, 100 S. Ct. 1585, defense counsel asserted that the state had the burden to prove that Wang's rights to counsel were not violated, and that the failure to do so meant that the enhancing element of a prior conviction was not proved. The second motion was offered as an alternative. Wang moved for a mistrial on the grounds that a fair trial could not be had because so many witnesses had testified about the prior conviction that the jury could not be effectively instructed to limit its use of that evidence. The court denied both defense motions.

The defense then rested without presenting any evidence and immediately renewed both motions. The court expounded on them, seeming at one point to acknowledge that there was a problem about the validity of the prior conviction, and at another point, that the amount of evidence about it was so prejudicial to defendant, without taking into consideration the sufficiency of the evidence to establish the prior conviction, that the jury was "misdirected" and no corrective instruction could cure that prejudice. Although not so stating,

the court seemed to have Evid. R. 403(B)[2] in mind. The court then said:

> I am going to deny your motion for Rule 29(B) (*sic*), but in the alternative grant a motion for a new trial (*sic*). We will set it as soon as possible. If you gentlemen will check your calendars. How about 9:00 o'clock on April 23rd? If you will present an entry granting your motion for new trial, please.

The entry subsequently journalized by the court[3] first denied the two defense motions as made at the close of the state's case and then went on:

> This cause came on further to be heard upon Defendant Ryan Hung-Ping Wang's Motion for Acquittal pursuant to Ohio Criminal Rule 29(A) and alternative Motion for New Trial, both made and reasserted at the close of all of the evidence. Having considered all evidence properly before the Court and the arguments of counsel, the Court finds that the admission of evidence offered against Defendant relating to the alleged prior conviction may have prejudiced him and may have misdirected

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[2] Evid. R. 403(B) reads:

> Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.
>
> * * *
>
> (B) Exclusion discretionary.
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

[3] For undisclosed reasons, this entry was not journalized until three weeks after the court ruled orally on the motions, but in the absence of any claim of error, we ignore the aberration.

Defense counsel clearly moved for a mistrial but the court called it a motion for a "new trial" without, however, designating the "cause" upon which the motion was grounded. *See* Crim. R. 33(A). As explained below, we believe the mistrial designation was correct.

the jury to the prejudice of Defendant. The Court further finds that it affirmatively appears from the entire record that Defendant was prejudiced by the testimony of witnesses and by the evidence offered against him relating to the alleged prior conviction and was prevented from having a fair trial, there being nothing in the evidence before the Court to show that Defendant had an attorney or that he knowingly and voluntarily waived his right to counsel at the time of the alleged prior conviction. Therefore,

IT IS FURTHER ORDERED that Defendant's Motion for Judgment of Acquittal made at the close of all of the evidence be denied; and

IT IS FURTHER ORDERED that Defendant's Motion for New Trial made at the close of all of the evidence be granted.

The case came on for a second trial at an earlier date (March 23, 1983) than anticipated, but only after counsel had filed in writing a renewed motion for judgment of acquittal and a motion to dismiss for double jeopardy. These were both denied by the trial judge,[4] who caused the case to be transferred to a visiting judge for trial. In this second 1983 trial, which was also before a jury, the motions for acquittal and dismissal were renewed but not ruled on by the visiting judge, who deferred to the rulings of the initial judge. In his introductory remarks to the jury, the visiting judge stated that the charge was theft with a prior conviction of theft, but that was the last mention about the prior conviction. It was never referred to again, either in opening statements, the evidence,

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[4] The overruling of a motion to dimiss on grounds of double jeopardy is a final appealable order under R.C. 2953.02 and 2505.02. *State* v. *Thomas* (1980), 61 Ohio St. 254, 400 N.E.2d 897. No claim is made by the state that the only appeal from such an order must be filed within thirty days of the date of entry of that order, under App. R. 4(B). For purposes of disposing of this appeal, we do not raise any question *sua sponte* about the timeliness of the notice of appeal. In any event, defendant could have filed a motion to leave to appeal under App. R. 5(A).

closing arguments, or the final instructions of the court. The jury found Wang guilty of petty theft; he was sentenced to thirty days and ordered to pay a fine of $200 and costs.[5]

II.

Wang presents two assignments of error,[6] in which we find, upon analysis, three separate claims: error in overruling his motion to acquit under Crim. R. 29; error in overruling his motion to dismiss for double jeopardy; and error in allowing a reprosecution that was vindictive and retaliatory. We will discuss these claims in that order.

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[5] Wang is a Chinese national and an alien subject to deportation on order of the Attorney General of the United States after conviction of two crimes involving moral turpitude. This threat gives the impetus to Wang's defense.

[6] Wang's two assignments of error read as follows:

FIRST ASSIGNMENT OF ERROR

The Trial Court committed prejudicial error by (1) overruling Defendant-Appellant's Motion to Acquit made at the close of the state's case and at the close of all the evidence, and (2) by overruling Defendant-Appellant's Renewed Motion to Acquit and to Dismiss the indictment for double jeopardy made before the second trial, at the close of the state's case, and at the close of all the evidence because the state had failed to prove an essential element of the offense charged in the indictment—a prior, counseled conviction. Therefore, reprosecution of Defendant-Appellant upon that felony indictment and for the same offense violated the prohibiton against double jeopardy in the Fifth Amendment of the U.S. Constitution and in Article I, Section 10 of the Ohio Constitution. (T.d. 42. T.d. 33, T.p. 162, 2T.p. 4-5, 3T.p. 168a-168b, 169-70).

SECOND ASSIGNMENT OF ERROR

Reprosecution of Defendant-Appellant on the felony indictment, after the trial court had granted Defendant-Appellant's Motion For a Mistrial based on the state's failure to prove an esential element of the indicted offense, violated Defendant-Appellant's constitutional right to due process of law under the Fifth and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 10 of the Ohio Constitution. (T.d. 33, T.d. 36, T.d. 42; 2T.p. 1-5, 7, 17, 35, 3T.p. 168-a-68b, 210-11, 4T.p. 1-82).

For the reasons set forth in the Opinions, we find no merit in either.

III.

Wang's claim that he was entitled to an acquittal at the conclusion of the first 1983 trial is without merit.[7] We hold that the evidence was sufficient to establish a constitutionally valid prior conviction, for two reasons. First, we believe that because no imprisonment, probation or other restriction on Wang's liberty was imposed in the 1980 conviction, it can be used to enhance the penalty for the 1983 conviction, even though Wang may not have had counsel in the 1980 proceedings. At that earlier time, no imprisonment was imposed, only a fine of $50 and costs. Under *Scott* v. *Illinois* (1979), 440 U.S. 367, 99 S. Ct. 1158, that penalty was constitutional despite the absence of counsel. Because that proceeding was constitutionally valid, we believe it can be used to enhance the penalty for his later theft. In our opinion, *Baldasar* does not prevent that use, because as we read that case, it was the deprivation of Baldasar's liberty in the prior conviction that made it unavailable to enhance the penalty in the subsequent conviction. Baldasar had been "sentenced to one year of probation," which in itself impinged on his liberty, and it is fair to assume that if Baldasar had broken any condition of his probation, he would have been subject to incarceration. On the other hand, where the prior conviction does not result in

[7] Obviously, if the evidence about the enhancing element had been wholly negative under any theory, Wang could still have been found guilty of the lesser included offense of petty theft. Crim. R. 31(C); R.C. 2945.74. Furthermore, there is a line of cases holding that when the first trial is inconclusive about guilt of a lesser included offense, even though not separately charged, a second trial on that offense only is not prohibited by the double jeopardy clause, assuming a clear acquittal of the greater offense. *Stone* v. *Superior Court of San Diego County* (1982), 31 Cal. 3d 503, 183 Cal. Rptr. 647, 646 P.2d 809; *State* v. *Pugliese* (N.H. 1980), 422, A.2d 1319; *Fierro* v. *State* (Tex. App. 1982), 626 S.W.2d 597; *State* v. *Davidson*, No. C-820647 (1st Dist. June 22, 1983). The question of double jeopardy arises in the instant case because Wang was brought to the second 1983 trial for grand theft as set forth in the indictment, not for the reduced charge of petty theft. If Wang had, in effect, been acquitted of grand theft, in the first trial, he could not be brought to trial again on that same charge. *Green* v. *United States* (1959), 355 U.S. 184, 78 S. Ct. 221.

any deprivation of liberty, as in Wang's 1980 conviction, it can be used to enhance the penalty in a subsequent offense.

Second, assuming *arguendo* that contrary to our interpretation of *Baldasar*, a prior conviction cannot be used to enhance a subsequent offense, if the defendant was unrepresented by counsel and did not waive counsel, irrespective of the penalty imposed in that prior conviction, we believe that the state of the instant case did not require a factual finding that in 1980 Wang was "uncounseled" (a word we use to mean that he did not waive, and was not represented by, counsel). Both the record and Wang were silent about whether he was counseled in 1980; Wang offered no evidence of any nature about this aspect of those proceedings. The question is who has the burden of proving compliance or noncompliance with the constitutional requirement of counsel, in these circumstances. The point is not decided in *Baldasar*, because that record indicated he was uncounseled. We find no reported case on the point in Ohio.

We believe that in these circumstances, it is fair to place on the defendant the burden of going forward with evidence of the consitutional violation, once the state has proved the existence of the prior conviction and the defendant's identification as the convicted person. The matter of representation is peculiarly within the defendant's knowledge and he can fairly be required to adduce evidence about them, as he would for any affirmative defense under R.C. 2901.05(C). It would be illogical, in our judgment, to place on the state the initial burden of proving, in the face of the silent record and a silent defendant, that all of his constitutional rights were observed and protected in a prior conviction used to enhance a current penalty. That would eliminate the presumption of the regularity of judicial proceedings and the doctrine of *res judicata;* it would require an unnecessary and burdensome review of the details of the prior proceeding. We find nothing in Ohio law, and particularly in R.C. 2945.75, that requires more than proof of the prior conviction by certified copy and the defendant's identification. If there was a constitutional violation in the earlier proceeding, the defendant will have

ample opportunity to come forward with his evidence. We find our ruling on the burden of going forward conforms with the weight of authority from other states.[8]

We hold that the trial court did not err in overruling Wang's three motions to acquit under Crim. R. 29, being the one made at the close of the state's case in the first 1983 trial, the one made at the close of all the evidence in that trial, and the written one made after the first jury was discharged and before the second trial began.

IV.

Wang's contention that the trial court erred in overruling his motion to dismiss the indictment on the grounds of double jeopardy requires an analysis of the meaning and effect of the trial court's orders at the end of the first 1983 trial. In Part I we reviewed these actions in detail. Wang argues that in effect, the court made an evidentiary finding that the state had failed to prove the 1980 conviction was constitutionally valid

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[8] The following cases hold either that the defendant cannot prevail by remaining silent about a silent record even though it appears to be invalid, or that the defendant has a burden affirmatively to come forward with his evidence about invalidity once the state has demonstrated the existence of the conviction and defendant's identity as the convicted person: *People* v. *Quintana* (Colo. 1981, 634 P.2d 413; *Collins* v. *State* (Ind. 1981), 415 N.E.2d 46; *State* v. *Garcia* (1979), 92 N.M. 730, 594 P.2d 1186; *Chancy* v. *State* (Tex. Cr. App. 1981), 614 S.W.2d 446; *State* v. *Aunino* (1980), 46 Or. App. 734, 613 P.2d 84; *Bell* v. *Commonwealth* (Ky. App. 1978), 566 S.W.2d 785. *Contra*, *Cohen* v. *State* (Nev. 1981), 625 P.2d 1170. We also note an indirect hint that the Ohio Supreme Court will impose on defendant at least the burden of going forward with evidence of a claimed constitutional violation in the face of a silent record. In *State* v. *Gerwin* (1982), 69 Ohio St. 488, 491, 432 N.E.2d 828, 830, the Court held that when no imprisonment was imposed in the subsequent trial, it was not necessary for defendant to have been represented by counsel at the prior conviction. The Court's "second" reason was that the record did not indicate that the defendant was indigent or financially unable to obtain counsel in the prior conviction. This appears to require the defendant to go forward with evidence when the prior record is silent on the point.

even though the motions to acquit were overruled, and that by reason of this finding Wang could not be tried again under the indictment. It is true that the substantive effect of a court order controls, and that for double jeopardy purposes, neither the technical terms of an order nor the court's own characterization of its order is determinative. *Lee* v. *United States* (1977) 432 U.S. 23, 97 S. Ct. 2141; *United States* v. *Sisson* (1970), 399 U.S. 267, 90 S. Ct. 2117. Even if the evidentiary ruling acquitting the defendant is made on erroneous legal conclusions, an acquittal will bar subsequent prosecution. *Sanabria* v. *United States* (1978), 437 U.S. 54, 98 S. Ct. 2170. Wang contends the trial court in effect acquitted him of the charge in the indictment, pointing to the phrase in the court's order which reads, "there being nothing in the evidence before the Court to show that Defendant had an attorney or that he knowingly and voluntarily waived his right to counsel at the time of the alleged prior conviction."

The state opposes these contentions, claiming that the trial court refused to acquit Wang and then declared a mistrial on Wang's own request, before any issue of fact was determined by the court or the jury. The state's argument is that no evidentiary conclusion about the validity of the prior conviction was reached, because the record was silent about Wang's counsel and the defendant had not carried his burden to demonstrate constitutional violations, and that the mistrial (denominated "new trial") was granted because the evidence about the prior conviction, although relevant, was needlessly cumulative. Evid. R. 403(B).

We are persuaded that the state's argument prevails. The trial court's oral discussion of the state of the evidence at the conclusion of the first 1983 trial and its entry both appear to treat the absence of evidence about Wang's counsel in the 1980 proceedings as a deficiency in the state's case, and this introduces an element of doubt and confusion about what the court was thinking. Nevertheless, we believe the substantive effect of the court's action was not to acquit Wang but to declare a mistrial, at Wang's request and for good and proper reasons. Three times the court overruled Wang's motions to

acquit. Thus, there was no "resolution, correct or not, of some or all of the factual elements of the offense charged," this quoted phrase being the Supreme Court's definition of an "acquittal" found in *United States* v. *Martin Linen Supply Company* (1977) 430 U.S. 564, 571, 97 S. Ct. 1349, 1355. We find no conclusive ruling on the evidence in the record. On the other hand, the court ordered a "new trial," stating its reason as being that the prejudicial evidence was so overwhelming that it could not effectively be eliminated from the jury's consideration. The court's order clearly contemplated a new trial on the offense as charged and not a termination of all prosecution; it was functionally indistinguishable from a declaration of mistrial. *Lee* v. *United States, supra* at 30, 97 S. Ct. at 2145. Furthermore, this action was taken at Wang's own request, *Id.* at 31, 97 S. Ct. at 2146; *United States* v. *Dinitz* (1976), 424 U.S. 600, 96 S. Ct. 1075, and under circumstances that manifested a necessity to discontinue the first trial in the interest of justice. *Wade* v. *Hunter* (1949), 336 U.S. 684, 69 S. Ct. 834. The trial court did not abuse its discretion in so doing. *Compare United States* v. *Jorn* (1971), 400 U.S. 470, 91 S. Ct. 547.

We hold that the effect of the trial court's orders at the conclusion of the first 1983 trial was to reject Wang's motions to acquit and to make a valid declaration of a mistrial. No error was committed in overruling Wang's motion to dismiss the indictment on grounds of double jeopardy.

V.

Wang' second assignment of error contains his third claim: that his reprosecution in the second 1983 trial was presumptively and in fact vindictive, and a violation of his rights to due process. We find no merit in this assignment for two reasons, either one of which is dispositive. First, the claimed error was not brought to the attention of the trial court by motion, objection or otherwise; indeed, it could not have been, because Wang's present argument is that the claimed vindictiveness is mainly evidenced by a series of post-

conviction actions. Not having been raised before the trial court when the error, if any, could have been voided or corrected, it is waived. *State* v. *Williams* (1977), 51 Ohio St. 2d 112, 364 N.E. 2d 1364. Second, the claim has no basis of fact because the claimed misconduct of the prosecution, in its separate parts and in its cumulative whole, constitutes nothing more than aggressive and vigorous prosecution of an indicted offense. We do not find in the record any attempt to "punish" Wang for exercising his guaranteed rights. *United States* v. *Goodwin* (1982), 457 U.S. 368, 102 S. Ct. 2485; *Bordenkircher* v. *Hayes* (1978), 434 U.S. 357, 98 S. Ct. 663.

We affirm.

KEEFE, J., concurs.

PALMER, P.J., dissents.

PALMER, P.J., Dissenting.

I quarrel with only one portion of my brother Black's otherwise lucid and persuasive analysis of a case about which it might truly be said that:

"Confusion now hath made his masterpiece!" MacBeth II, iii, 72.

I agree completely with the majority in finding meritless those aspects of the assignments of error directed to the overruling of the Crim. R. 29 motion, and to a "vindictive and retaliatory" reprosecution; I find I cannot concur in the majority's disposition of the double jeopardy issue as set forth in Part IV of Judge Black's Opinion, and therefore dissent.

To put the matter in its simplest form, if the trial court aborted the instant proceedings because he concluded that prejudice resulted from an overenthusiastic array of witnesses testifying for the state about the defendant's prior conviction, a retrial could be had without prejudice to the defendant's constitutional rights. *See United States* v. *Martin Linen Supply Co.* (1977), 430 U.S. 564, 97 S. Ct. 1349. If, on the other hand, proceedings were terminated because the trial court agreed with the defendant that the state had failed to

prove that the defendant had the benefit of or had waived counsel at the time of the prior conviction, and that the prior conviction was therefore a nullity, then the defendant could not constitutionally be retried — as he was — for the same offense. *See United States* v. *Martin Linen Supply Co., supra.* Moreover, the double jeopardy bar would subsist whether or not the trial court was legally correct in concluding that the state had failed in some aspect of its burden of proof. *See Sanabria* v. *United States* (1978), 437 U.S. 54, 98 S. Ct. 2170. We are not, therefore, here to pass judgment on the *correctness* of such a ruling, but rather, only on whether such a judgment was in fact made. If so, and irrespective of what words or terms the trial court chose to apply or misapply to it, whether "acquittal," "mistrial," or the wholly inappropriate term actually chosen, "new trial," the substantive effect of the order would bar a second prosecution.

With so much of an analysis, I take it the majority would not disagree. But there is an additional point undiscussed by the majority which seems to me to require articulation: I take it that if the trial court terminated the trial for *both* reasons, *i.e.*, because he concluded both prejudice in the number of witnesses *and* because he concluded, rightly or wrongly, that the state failed to prove the enhancing element of a constitutionally valid prior conviction, the defendant's position became one of jeopardy and he could not thereafter be tried for the same offense. *See United States* v. *Martin Linen Supply Co., supra.* The state cannot be permitted to sort among a variety of causes for termination, some requiring jeopardy to attach and others not, in order to select and rely on that cause which would not inhibit a retrial of the defendant. I emphasize this because my reading of the record, confusing at times as that document is, leads me to conclude that this quite probably was what was in the trial court's mind when he aborted the proceedings in question.

There are, essentially two sources for my above conclusion. One, the judgment entry granting the "new trial," faithfully reproduced on page four of the majority Opinion, and the second consisting of the ruminations of the court, following

an oral renewal of the defendant's motions for acquittal and for a mistrial at the conclusion of the case. These remarks, as reproduced at pp. 161-164 of the transcript of proceedings, are set out in the Appendix following, along with a copy of the judgment entry in question. Both sources require careful reading to sort out obvious instances of what we might generously call terminological inexactitude. Both nevertheless indicate to me, at least, a very clear conclusion drawn by the trial court that the state's case suffered from *two* fatal impediments.

The first and principal perceived defect was that drawn from the court's reading of *Baldasar* v. *Illinois* (1980), 446 U.S. 222, 100 S. Ct. 1585, which it felt was "right on point [with the case] which is before the court today." T.p. 161. The record, said the trial court:

> would indicate to me that there was no representation by a lawyer or that there was no formal waiving of any right to any attorney. We run into a classic Fifth and Sixth Amendment rights in this particular case. *Baldasar*, and going all the way back to *Gideon* v. *Wainwright*, the right of counsel through the 14th Amendment, *and this being a specific element of the particular charge before the Court* and there being nothing in the evidence before the Court by virtue of State's Exhibit Number 4, the prior conviction, to show that he had an attorney, or that there was a waiver of right to counsel, puts the Court between a rock and a hard place. *What I have to do is I have to decide whether or not there is any way I can admonish the jury that they would disregard all of that testimony with regard to that prior conviction and arrive at a fair and just verdict* (emphasis added).

T.p. 162. The trial court then continues for the next few pages to conclude that because of the fact that six of the eight state's witnesses gave testimony relating solely to that prior conviction, the trial court could not effectively wipe the testimony from their minds and leave anything of value upon

which to deliberate. It is unclear whether the trial court meant *also* to indicate that the very number of witnesses to the prior conviction furnished an *independent* basis of prejudice, but we will assume it to be so.

Remembering that we are not concerned at this point with whether the trial court was *correct* in his application of Baldasar (he was not), *but only the substantive effect of his ruling*, it is inescapable to me that the primary, if not the only, basis for the trial court's termination of the trial lay in his reading of *Baldasar* and its perceived impact on the evidence of the prior conviction, destroying that "specific element" of the charge, as the trial court would put it. If I read this properly, then demonstrably there was a "resolution, correct or not, of some or all of the factual elements of the offense charged," requiring an acquittal. *See United States* v. *Martin Linen Supply Co.*, *supra* at 571, 430 S. Ct. at 1355. Jeopardy, under such circumstances, ensues as a matter of course.

This reading of the trial court's thinking is buttressed by the language of the judgment entry, which is, to me at least, quite unequivocal. Thus:

> *The Court further finds* that it affirmatively appears from the entire record that Defendant was prejudiced by the testimony of witnesses *and by the evidence offered against him relating to the alleged prior conviction and was prevented from having a fair trial, there being nothing in the evidence before the Court to show that Defendant had an attorney or that he knowingly and voluntarily waived his right to counsel at the time of the alleged prior conviction* (emphasis added).

T.d. 42. Again, if it is true that the trial court found an *independent* source of prejudice in the number of witnesses offered by the state on the prior conviction issue — which is arguable but which I am perfectly content to concede — he certainly found the existence of a second critical deficiency in the state's evidence with respect to the prior conviction

resulting from a perceived failure of proof as to its constitutional prerequisites. So I can only read the relevant material.

The majority asks, in effect, that if this was so, why then did not the court grant the appropriate remedy for such a fundamental defect in proof, the motion to acquit, rather than granting a "new trial," or, translating it to more appropriate terms, a mistrial? There is simply no satisfactory answer to this, unless one wishes to conjecture along the lines suggested by footnote seven of the majority Opinion. My own conclusion would reject this legally satisfactory but overly ingenious approach. I believe that the trial court quite simply selected the wrong remedy (mistrial instead of acquittal, or, alternatively, a reduction to the lesser included offense of petty theft) for the wrong reason (see Part III of the majority Opinion), giving it in the process a wrong name (new trial). The result of this unfortunate concatenation of errors was the attachment of jeopardy to the defendant.

I would, therefore, reverse and discharge.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

APPENDIX
[TO OHIO COURT OF APPEALS OPINION]

MR. HOFFHEIMER: Your Honor, at this time the defense will reassert its motion for acquittal and motion for mistrial.

THE COURT: Without going over that which you have already emphasized, do you have anything to add?

MR. HOFFHEIMER: I don't believe there's anything further to add unless the Court has further questions.

MR. GRONEMAN: Nothing, your Honor.

THE COURT: Now we are in a different posture. The problems I think are obvious to us all, especially when one takes into consideration the evidence which is before the Court at this time and the Supreme Court's ruling on the Baldasar Case. I think the Loper Case can be differentiated from the Baldasar Case wherein that case there's a suggestion of an impeachment of credibility by virtue of a prior conviction. It is not the same case which is right on point which is before the Court today, which is decided in Baldasar, the 1980 case.

The record in this particular case, it would indicate to me that there was no representation by a lawyer or that there was no formal waiving of any right to any attorney. We run into a classic Fifth and Sixth Amendment rights in this particular case. Baldasar, and going all the way back to Gideon vs. Wainwright, the right of counsel through the 14th Amendment, and this being a specific element of the particular charge before the Court and there being nothing in the evidence before the Court by virtue of State's Exhibit Number 4, the prior conviction, to show that he had an attorney, or that there was a waiver of right to counsel, puts the Court between a rock and a hard spot. What I have to do is I have to decide whether or not there is any way I can admonish the jury that they would disregard all of that testimony with regard to that prior conviction and arrive at a fair and just verdict.

Since six of the eight witnesses who have testified on behalf of the State testified solely on the basis of the prior conviction

and added nothing to the testimony with regards to the merits of the charge as it would be without that prior conviction, if asked, overwhelmingly weigh the evidence as presented to the jury, is solely based upon that incident in 1980.

If the defendant had taken the stand I could have given them a limiting charge. I still don't know if that limiting charge would have rectified the record with regard to keeping the record in a position where the defendant was not prejudiced or keeping the jury in a position where the jury was not prejudiced by the introduction of that testimony.

With regard to your motion for a new trial which you referred to as a motion for a mistrial, I do believe that the admission of the evidence which was offered against the defendant obviously is prejudiced towards his rights in this particular case. I believe the jury had been misdirected and that misdirection has caused prejudice.

I am not disparaging the prosecution. I know you presented the case in the only manner you could have. I believe from the evidence that the defendant was prejudiced, thereby, and prevented from having a fair trial. On that basis I am going to grant a motion for a new trial, and we will set it.

I am going to deny your motion for Rule 29 (B), but in the alternative grant a motion for a new trial. We will set it as soon as possible. If you gentlemen will check your calendars. How about 9:00 o'clock on April 23rd? If you will present an entry granting your motion for new trial, please.

(Whereupon, the proceedings were concluded.)

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. B830233
(Judge Schott)

STATE OF OHIO,

Plaintiff,

vs.

RYAN HUNG-PING WANG
2567 Erie Avenue
Cincinnati, Ohio 45202,

Defendant.

JUDGMENT ENTRY

(Entered April 14, 1983)

This cause came on to be heard upon Defendant Ryan Hung-Ping Wang's Motion for Judgment of Acquittal pursuant to Ohio Criminal Rule 29(A) and alternative Motion for New Trial, both made at the close of the State's case. Having considered all evidence properly before the Court and the arguments of counsel,

IT IS ORDERED that Defendant's Motion for Acquittal and alternative Motion for New Trial, both made at the close of the State's case, be denied.

This cause came on further to be heard upon Defendant Ryan-Hung-Ping Wang's Motion for Acquittal pursuant to Ohio Criminal Rule 29(A) and alternative Motion for New Trial, both made and reasserted at the close of all of the evidence. Having considered all evidence properly before the Court and the arguments of counsel, the Court finds that the admission of evidence offered against Defendant relating to the alleged prior conviction may have prejudiced him and may have misdirected the jury to the prejudice of Defendant. The Court further finds that it affirmatively appears from the

entire record that Defendant was prejudiced by the testimony of witnesses and by the evidence offered against him relating to the alleged prior conviction and was prevented from having a fair trial, there being nothing in the evidence before the Court to show that Defendant had an attorney or that he knowingly and voluntarily waived his right to counsel at the time of the alleged prior conviction. Therefore,

IT IS FURTHER ORDERED that Defendant's Motion for Judgment of Acquittal made at the close of all of the evidence be denied; and

IT IS FURTHER ORDERED that Defendant's Motion for New Trial made at the close of all of the evidence be granted.

IT IS SO ORDERED.

/s/ JUDGE SCHOTT
Judge, Court of Common Pleas,
Hamilton County, Ohio
Nunc pro Tunc 3-9-83

/s/ RAYMOND C. GRONEMAN
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CERTIFICATE OF SERVICE

I certify that all parties required to be served have been served in that I served three copies of the foregoing Respondent's Brief In Opposition upon Arthur M. Ney, Jr., Esquire, Prosecuting Attorney of Hamilton County, Ohio, by mailing them in a U.S. mailbox to William E. Breyer, Esquire, Assistant Prosecuting Attorney, 420 Hamilton County Courthouse, 1000 Main Street, Court and Main Streets, Cincinnati, Ohio 45202, and I served three copies upon Anthony J. Celebrezze, Jr., Esquire, Attorney General of Ohio, by mailing them in a U.S. mailbox to William J. Steele, Esquire, Assistant Attorney General, State Office Tower, 26th floor, 30 East Broad St., Columbus, Ohio 43215, by first class U.S. mail, postage prepaid, this ____ day of April 1987.

DANIEL J. HOFFHEIMER